APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Nos. 98-3011, 98-3261, 98-3306.

PAULA DARLENE HAMPTON,
Plaintiff,

DEMETRIA COOPER,
Plaintiff-Appellant,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellee,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant.

April 24, 2001

Before HENRY, STEPHEN H. ANDERSON and LUCERO, Circuit Judges.

HENRY, Circuit Judge.

Paula Darlene Hampton filed suit against Dillard Department Stores, Inc. (Dillard's), claiming that the company had unlawfully interfered with her right to make and enforce a contract in violation of 42 U.S.C. § 1981. A jury awarded her compensatory and punitive damages based on its findings that (1) Ms. Hampton "was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996," Aplt's App. vol. 1, at 147 (verdict form from phase one of trial); (2) Dillard's "intentionally interfered with [her] ability to receive a free cologne sample," *id.*; and (3) Ms. Hampton's "race was a motivating factor in [Dillard's] conduct on April 5, 1996." *Id.* at 160 (verdict form from phase two of trial). Dillard's thereafter filed a motion for judgment as a matter of law, which the district court denied. Dillard's now appeals, raising various objections to the district court's denial of its motion.

We review the district court's denial of Dillard's motion for judgment as a matter of law de novo, "applying the same legal standard as the district court." *Brown v. Gray*, 227 F.3d 1278, 1285 (10th Cir.2000). A party is entitled to judgment as a matter of law "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir.2000). It is important to note that, "[i]n reviewing the record, *we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.* Judgment as a matter of law is appropriate [only] if there is no *legally sufficient evidentiary basis* for a claim under the controlling law. We

consider the evidence, and any inferences drawn therefrom, in favor of the non-moving party." *Brown*, 227 F.3d at 1285 (emphasis added and internal quotation marks omitted).

Thus, Dillard's has a high hurdle to overcome. The focus of Dillard's appeal is on three questions: (1) whether the fragrance coupon was in fact a benefit of Ms. Hampton's purchase; (2) whether there was indeed intentional interference with Ms. Hampton's redemption of the coupon; and (3) whether the interference was in the end based on racial discrimination. We agree with the district court that these are questions of fact, not law, *see, e.g., Hampton v. Dillard Dep't Stores, Inc.*, 18 F.Supp.2d 1256, 1265 (D.Kan.1998) (noting that the issue of discrimination is a question of fact), and the jury made explicit findings as to each. On appellate review, we cannot challenge the jury's findings of fact; instead, we may only ask whether there was a "legally sufficient evidentiary basis for a reasonable jury to find for [Ms. Hampton]" on each fact. Fed.R.Civ.P. 50(a). Because there was such a basis, we must affirm the district court's order.

I. BACKGROUND

The following material facts are taken from the district court's orders below and from the trial transcript. These facts are undisputed, or where disputed, are taken, as we are required to take them, in the light most favorable to Ms. Hampton. We shall first briefly summarize the facts in this case, while we reserve a more detailed description of the evidence for later discussion of specific issues raised by the parties.

On April 5, 1996, Ms. Hampton and her niece, Demetria Cooper, both African Americans, were shopping for an Easter outfit for Ms. Cooper's one-year-old son in the Dillard's children's department in Overland Park, Kansas. The plaintiffs had four children with them: Ms. Cooper's son, Ms. Hampton's eight-month-old and seven-year-old daughters, and her elder daughter's friend.

Shortly after they entered the store, Tom Wilson, a Dillard's security officer, noticed them. He observed them for more than fifteen minutes. Mr. Wilson testified that he paid close attention to the party, in part, because they had a stroller with them, because Ms. Cooper had a rolled-up dark cloth item in her hand, and because Ms. Cooper kept looking up at the ceiling and glancing around, as if to check to see if she was being watched. Because his suspicions were aroused, he asked fellow employee Pam Fitzgerel to continue the surveillance in a fitting room in the children's department, where the plaintiffs were trying clothing on Ms. Cooper's one-year-old son. At trial, Ms. Fitzgerel testified that Ms. Cooper was holding a rolled-up cloth item in the fitting room; that she later saw an item under Ms. Cooper's jacket; and that, believing the item to be store merchandise, she contacted Mr. Wilson and told him that she was positive that Ms. Cooper had put something under her coat.

The group left the fitting room and Ms. Hampton proceeded to purchase an outfit for Ms. Cooper's son from the salesclerk in the children's department. When she did so, the sales associate gave Ms. Hampton and Ms. Cooper each a coupon that was redeemable at the fragrance counter for cologne samples. The shopping group then proceeded on to the fragrance counter, which is located where the Dillard's store ends and opens into the Oak Park Mall, to redeem their fragrance coupons.

While the women were in the process of redeeming their coupons and while the women were in a conversation with fragrance consultant Betty Chouteau, Mr. Wilson interrupted them. Referring to Ms. Cooper, he advised Ms. Hampton that "the . . . black female had been observed placing something in her coat." Aple's Supp.App. at 121 (Dillard's Security Report, dated Apr. 5, 1996). He asked to look inside the Dillard's bag carried by Ms. Hampton, took the bag, and emptied the contents on the fragrance counter. Mr. Wilson

checked the items against the receipt and determined that they corresponded. Ms. Chouteau testified that she perceived it to be "a rather embarrassing situation" for the women and, upon Mr. Wilson's intervention, she "turned and started talking to other people." Aplt's App. vol. 3, at 624 (testimony of Ms. Chouteau).

While Mr. Wilson was matching up items to the receipt, Ms. Hampton became visibly upset and told Mr. Wilson that, as a regular customer of Dillard's, she did not appreciate being accused of shoplifting and she did not deserve to be treated this way. Mr. Wilson told her to calm down or he would call the Overland Park police and have her removed from the store. Ms. Hampton asked Mr. Wilson his name and the location of the customer service counter. She then proceeded to the customer service counter and had no more contact with Mr. Wilson. The encounter with Mr. Wilson lasted approximately five minutes. Ms. Hampton and Ms. Cooper subsequently filed suit against Dillard's, alleging false imprisonment under Kansas law and a violation of 42 U.S.C. § 1981.

A. *Procedural History*

Ms. Hampton and Ms. Cooper based their state tort claims on their detention by Mr. Wilson. They based their § 1981 claims on the observation and detention by Mr. Wilson and on the store's disparate security practices of "arresting or detaining African-American shoppers at a significantly greater rate than it arrests or detains white shoppers." Aplt's App. vol. 1, at 5 (complaint). They alleged that their "detention was a part of this pattern or practice." *Id.*

Following the close of discovery, Dillard's moved for summary judgment on both claims. The district court granted Dillard's summary judgment on the state tort claims and on most of the § 1981 claims. The only § 1981 claim that the

district court allowed to proceed to trial was the claim that Dillard's interfered with the plaintiffs' ability to redeem the perfume sample.

The district court noted, however, that whether *Ms. Cooper's* coupon claim was actionable remained in doubt, as the coupon was not received by Ms. Cooper as the result of a purchase but as a benefit of *Ms. Hampton's* purchase. The court ordered Ms. Cooper to show cause why her claims should survive in the absence of any purchase made by her. The court subsequently rejected Ms. Cooper's contention that, as a third-party beneficiary of the sale to Ms. Hampton, her § 1981 claim should survive, and the court in turn dismissed Ms. Cooper's remaining claim on the day before trial.

Noting that our § 1981 jurisprudence requires that the action interfered with must be based on a contract, *see Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir.1989) (requiring actual loss of a contract interest for a § 1981 claim for interference with the right to make and enforce a contract),[1] the district court decided to bifurcate the trial. In the first phase, the jury was to determine whether the fragrance sample was a benefit of Ms. Hampton's purchase from Dillard's and whether Dillard's intentionally interfered with the redemption of the coupon. If the jury found the coupon was a benefit of purchase and that Dillard's intentionally interfered, it would proceed to phase two, in which it would determine whether the store's intentional interference was racially motivated. The jury found for Ms. Hampton on all of the issues presented in both phases, and awarded her $56,000 in compensatory damages and $1.1 million in punitive damages. The district court entered judgment in

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[1] Although our decision in *Phelps* predated the 1991 amendments to § 1981, these amendments do not alter the requirement of an actual loss of a contract interest. *See, e.g., Wesley v. Don Stein Buick*, 42 F.Supp.2d 1192, 1200 n. 7 (D.Kan.1999).

accordance with the verdict and rejected Dillard's Motion for Judgment as a Matter of Law, or Alternatively for a New Trial or Remittitur.

Dillard's now appeals the district court's denial of its motion for judgment as a matter of law and claims that (1) it is entitled to judgment on Ms. Hampton's § 1981 claim because the coupon was not a contract; (2) if the coupon was a contract, there was no interference with a contract interest; and (3) there was no interference with a contract interest based on racial discrimination. Dillard's also appeals the district court's denial of a new trial and contends it was unfairly prejudiced by (1) various instructional errors that misled the jury and (2) various evidentiary admissions and exclusions that were in error. Finally, Dillard's challenges the award of compensatory and punitive damages and the award of attorney's fees.

In addition, Ms. Cooper appeals the district court's dismissal of her § 1981 claim and her state law claim. The Lawyer's Committee for Civil Rights has filed an amicus curiae brief in support of (1) affirmance of the verdict and judgment in favor of Ms. Hampton and (2) reversal of the dismissal of Ms. Cooper's claims. Beginning with the defendant's appeal, we shall review each contention in turn.

II. CASE NOS. 98-3011, -3261 ANALYSIS

A. Ms. Hampton's § 1981 Claim

1. Elements of a § 1981 Claim

With respect to 42 U.S.C. § 1981, to establish a prima facie case of discrimination under § 1981,[2] the plaintiff must show:

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[2] Specifically, § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

(1) that the plaintiff is a member of a protected class;

(2) that the defendant had the intent to discriminate on the basis of race; and

(3) that the discrimination interfered with a protected activity as defined in § 1981.

See Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1532 (10th Cir.1995) ("Section 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'") (quoting 42 U.S.C. § 1981); *see also Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir.1997) (listing three elements); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996) (applying elements to retail transaction). These elements "are flexible and are not to be applied rigidly." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 n. 2 (10th Cir.1994).

Typically, most litigation involving § 1981 claims has emanated from the right to make and enforce employment

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contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the *making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis supplied).

contracts. *Cf.* S.Rep. No. 101-315 (1990) (noting that § 1981 was a response to "a series of recent decisions addressing employment discrimination claims" where "the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections" and that the purpose of the act is "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions"); *Morris*, 89 F.3d at 413 (noting predominance of § 1981 claims addressing employment discrimination). However, the statute has been applied to discrimination claims arising in the retail sector and restaurant industry, when a contract has been established. *See, e.g., Bobbitt v. Rage, Inc.*, 19 F.Supp.2d 512, 518-20 (W.D.N.C.1998) (allowing action to proceed where plaintiffs, who were forced to prepay for food in pizza restaurant, demonstrated that the restaurant altered a fundamental characteristic of the food service based on race); *Washington v. Duty Free Shoppers, Ltd.*, 710 F.Supp. 1288, 1289-90 (N.D.Cal.1988) (denying summary judgment to defendant where African American were customers told they needed to show a passport and airline tickets before shopping for duty-paid goods, while other customers were not required to do so).

Applying the prima facie elements to the factual setting of this case, the district court instructed the jury that the plaintiff must establish:

> First, that plaintiff was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996;
>
> Second, that defendant intentionally interfered with plaintiff's right to enjoy the benefits and privileges of that purchase; and
>
> Third that plaintiff's race was a motivating factor in defendant's conduct. Aplt's App. at 151 (Instruction 18). We will discuss each of these elements, beginning with whether there was interference with a contract.

2. The Coupon as Part of the Purchase Contract

Dillard's appeals the district court's denial of its motion for judgment as a matter of law, first contending that the coupon was not a contract. We review the district court's denial of a motion for judgment as a matter of law de novo, applying the same legal standard as the district court. *See Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1268 (10th Cir.2000). But the legal standard that we and the district court must use is, as noted earlier, difficult for the movant: a party is entitled to judgment as a matter of law only if the "evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Id.* (internal quotation marks omitted). In reviewing the record, we "will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." *Id.* Judgment as a matter of law is only appropriate if there is no legally sufficient evidentiary basis for a claim under the controlling law. *See id.* We consider the evidence, and any inferences drawn therefrom, in favor of the nonmoving party. *See id.*

Dillard's challenges whether the fragrance coupon was a benefit of Ms. Hampton's contractual relationship for the purchase of children's wear. According to Dillard's, the coupons were promotional invitations, handed out indiscriminately and not exclusively in connection with a purchase. *See* Aplt's App. vol. 3, at 622, 648, 650, 655, 657. Dillard's maintains that the coupon was a gift and that it was never intended to confer a right upon its recipient. In addition, Dillard's points to Ms. Cooper's receipt of a coupon as evidence that a purchase was not required to receive the gift.

In rebuttal, Ms. Hampton argues that we must be mindful of the jury's appraisal of the credibility of the witnesses as well as the jury's resolution of factual issues. *See United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1227 (10th Cir.2000) (noting "[t]he jury has the exclusive function

of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact") (internal quotation marks omitted). She and Ms. Cooper testified that, during the time they shopped at the Dillard's store (over an hour), they never saw anyone receive a coupon and saw no one distributing the coupons. The first they saw of the coupons was *after* Ms. Hampton had purchased merchandise. Furthermore, the sales representative from the fragrance company, Ms. Chouteau, testified that the purpose of the promotional coupon, handed out after a customer of Dillard's had made a purchase, was "to entice the shoppers to come to the fragrance [counter] so that we could talk to them about our product." Aplt's App. vol. 3, at 622 (testimony of Ms. Chouteau). All such promotions were supported and agreed to by Dillard's. *See id.* at 663 (testimony of Ms. Dirks, Dillard's operations manager). Finally, Ms. Cooper testified that, upon receipt of the coupons, the children's wear salesperson directed her shopping party toward the appropriate fragrance counter.

Ms. Hampton contends that she performed the steps necessary to act in compliance with the terms and conditions of the offer from Dillard's: she completed a purchase and presented the coupon to the fragrance counter. The performance of these acts, she argues, either constitutes an acceptance or entitles her to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," as the statute says.

Clearly, the purpose of the statute is to "make it clear that the right to 'make and enforce contracts' free from race discrimination [is] protected by section 1981." S.Rep. No. 101-315 (1990). Furthermore, the list set forth in subsection (b) of the statute, which gives examples of what might constitute the "making" or "enforcing" of a [sic] under the Act, "is intended to be illustrative rather than exhaustive." *Id.*

We have clarified "that a § 1981 claim for interference with the right to make and enforce a contract must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *See Wesley*, 42 F.Supp.2d at 1200 (citing *Phelps*, 886 F.2d at 1267).

In the context of a retail transaction, this court has not had the opportunity to address or apply subsection (b). *See id.* at 1200 & n. 8 (citing *Morris*, 89 F.3d at 413). There is even less guidance as to what constitutes a contract for the purposes of a § 1981 claim involving a retail transaction, and as such, we are authorized to look to common law. *See* 42 U.S.C. § 1988(a).

Section 45 of the *Restatement (Second) of Contracts* provides illumination on the common law of contracts regarding an invitation to accept an offer by performance:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Restatement (Second) of Contracts § 45 (1981). The Comment to § 45 further provides that

> [t]his Section is limited to cases where the offer does not invite a promissory acceptance. Such an offer has often been referred to as an "offer for a unilateral contract." Typical illustrations are found in offers of rewards or prizes. . . .

Id. § 45 cmt. a; *see also Brown v. State*, 230 Wis.2d 355, 602 N.W.2d 79, 88 (Ct.App.1999) (noting that "performance by the entrant of the act requested by the sponsor—there,

returning an eligibility card—constitutes an acceptance of an offer and forms a binding contract;" also noting that nearly all jurisdictions have adopted the rule "that contract law governs the sponsor-contestant relationship") (internal quotation marks omitted). Here, Dillard's offered a variance of an option or unilateral contract to Ms. Hampton, and she completed the invited performance in accordance with the terms of the offer. *See Restatement (Second) of Contracts* § 45; *cf. Perry v. Burger King Corp.*, 924 F.Supp. 548, 552 (S.D.N.Y.1996) (denying motion to dismiss where customer finished meal and sought to use restaurant's restroom facilities; noting that plaintiff may be "considered to have contracted for food *and* use of the bathroom" as benefit of contractual relationship).

Dillard's also contends that Ms. Cooper's receipt of a coupon undermines the jury's finding that the coupon was a benefit of Ms. Hampton's purchase contract. We disagree. Ms. Cooper, whose child received the clothing, was a part of the shopping party, and perhaps the store clerk thought Ms. Cooper too should receive the coupon. The jury weighed testimony regarding the receipt of such coupons by non-purchasing customers and determined that the evidence weighed in favor of Ms. Hampton, *i.e.*, the coupon was a benefit of Ms. Hampton's contractual relationship with Dillard's.

With regard to the purpose of the coupon, Ms. Chouteau testified that it served "to entice the shoppers" to sample her company's products. Aplt's App. vol. 3, at 622 (testimony of Ms. Chouteau). She also stated that coupon holders were " 'entitled to'" a fragrance sample. *Id.* at 625. In addition, we note that the benefit ran to Dillard's as well: to sample those products, the customer would traverse the store, perhaps eyeing other merchandise for purchase from Dillard's. The jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of

a contractual relationship are not against the weight of the evidence as a matter of law. Whether or not this providing of the sample in hopes that a customer would walk back through the store and purchase cologne or another item was itself an option or unilateral contract, we cannot say that the jury's conclusion that the coupon was a benefit of Ms. Hampton's contract with Dillard's was unreasonable.

3. Intentional Interference with Redemption of the Coupon

Dillard's also sought judgment as a matter of law because Ms. Hampton suffered no actual loss of a contract right or interest. *See Phelps*, 886 F.2d at 1267 (emphasizing that actual loss is protected by § 1981, not possible loss); *Morris*, 89 F.3d at 414-15 ("A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities.") (citing *Phelps*, 886 F.2d at 1267). Dillard's contends that Ms. Hampton was not denied a service or product, as required by *Morris*. At trial, Mr. Wilson testified on behalf of Dillard's that he stopped the women while they were approaching the store's exit and that he did not believe them to be exchanging their coupons for fragrance samples.

A recollection of Mr. Wilson's testimony may explain why the jury and district court reached the decisions that they did:

> Q: What did you think Paula Hampton and Demetria Cooper were doing when you approached them?
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> A: They were getting ready to exit the Dillard's store to go out into the mall.
>
> Q: Okay. Did you notice that they were speaking with a cosmetic associate or a fragrance consultant when you approached the two ladies?
>
> A: No, I did not.

Q: Did you knowingly prevent Paula Hampton from receiving a free cologne sample?

A: No, I did not.

Aplt's App. vol. 3. at 634 (testimony of Mr. Wilson). Thus, we have a trained security guard claiming that he did not notice that the women were redeeming a coupon. Indeed, he did not notice that they were shopping or even talking with a salesperson.

This testimony was directly contested by Ms. Hampton and Ms. Cooper. The jury could have resolved this conflict based on their evidence, but the silver bullet may have been the testimony of Ms. Chouteau, the perfume consultant:

Q: [D]o you recall Paula Hampton and Demetria Cooper and their children coming up to the cosmetics counter?

A: I do.

Q: Do you recall that their discussion with you was interrupted by a Dillard's security officer?

A: Yes, I do.

. . . .

Q: When [O]fficer Wilson came up and spoke, what did you do then?

A: Well, because it was a rather embarrassing situation and because I was very busy with a lot of other things going on, I turned and started talking to other people at the time with my back to them.

Q: With your back to whom?

A: To the officer and Paula. I mean, I just felt like it was an embarrassing situation for them and I felt uncomfortable, you know, watching, so I turned and went ahead and did what I was supposed to be doing.

Aplt's App. vol. 3 at 621-22, 624 (testimony of Ms. Chouteau).

Once again, the evidence in the record is sufficient for the jury to determine that Mr. Wilson deliberately interfered with Ms. Hampton's redemption of the coupon and that she suffered an actual loss of a privilege of her contract because of this interruption. Ms. Hampton testified that after he approached her and identified himself while she was at the fragrance counter, Mr. Wilson "took [her shopping] bag, dumped the contents out on the counter, and compared them to the receipt that was in the bag, and then he shoved everything back at [her]." Aplt's App. vol. 3, at 830 (testimony of Ms. Hampton). After this, Ms. Hampton told Mr. Wilson she was shocked to be accused of shoplifting, and Mr. Wilson subsequently threatened to have her removed from the store. *See id.* at 830-32.

The jury concluded that, had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon. As the district court noted, the "plaintiff produced legally sufficient evidence that Wilson intentionally interfered with the redemption of the coupon." *Hampton*, 18 F.Supp.2d at 1264. We do not question the jury's credibility determinations, and we cannot say that as a matter of law the jury's conclusion is incorrect. *See Deters*, 202 F.3d at 1268 ("In our review of the record, we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.")

The dissent notes that Mr. Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon.[3] We agree, but note that § 1981 protects

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[3] Although the dissent may be quite correct in observing that the timing of Mr. Wilson's interference was "purely fortuitous," Mr. Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action. *See Morris*, 89 F.3d at 414 (explaining that plaintiffs were stopped *after* making purchase and claim failed because "[t]hey were neither denied neither admittance nor service, nor were they asked to leave the store"); *Wesley*, 42 F.Supp.2d at 1201

enjoyment of the benefits of a contract from *any* impairment, so long as the impairment arises from intentional discrimination. *See* 42 U.S.C. § 1981(a) ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."). Thus the proper focus is on whether the defendant had the intent to discriminate on the basis of race, and whether that discrimination interfered with the making or enforcing of a contract. *See Bellows v. Amoco Oil Co.*, 118 F.3d at 274 (listing three elements of prima facie case). We cannot say as a matter of law that the jury's conclusion that Dillard's had the intent to discriminate on the basis of race was incorrect.

Even under the dissent's suggestion that subjective intent to interfere with a contract is required, a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if it disbelieved Mr. Wilson's testimony. As to the issue of Dillard's intent, the court correctly instructed the jury during the first phase of the trial that Ms. Hampton had the burden of proving by a preponderance of the evidence that "defendant [i.e. Dillard's] intentionally prevented her from redeeming [the] coupon. . . ." Aplt's App. vol. 1, at 139 (Instruction 10). We note that, because "[t]he issue of intent . . . is one that is often not susceptible to direct proof," the jury correctly "consider[ed] all conflicting inferences" that the circumstantial evidence presented. *See Washington*, 710 F.Supp. at 1289 (citing *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)). The jury weighed the conflicting testimony and made its credibility determinations, apparently in favor of Ms. Chouteau, who made it

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(dismissing § 1981 claim because plaintiff unable to point to any evidence in the record that she "intended to purchase a car during her visit"); *Lewis v. J.C. Penney Co.*, 948 F.Supp. 367, 372 (D.Del.1996) (dismissing § 1981 claim because plaintiff "had *done* her shopping and was leaving the store" when security guards stopped her) (emphasis added); *Robertson v. Burger King*, 848 F.Supp. 78, 81 (E.D.La.1994) (dismissing § 1981 claim where "plaintiff was not denied admittance or service").

clear that Mr. Wilson interrupted an ongoing transaction. As discussed below, the jury concluded there was sufficient indirect evidence of a discriminatory motive on the part of Dillard's and Mr. Wilson. As such, we cannot say that "the evidence points but one way, and is susceptible to no reasonable inferences supporting [Ms. Hampton's] claim." *Tyler*, 232 F.3d at 816.

4. Racial Discrimination

Dillard's next contends that it deserved judgment as a matter of law because there is no evidence of racial discrimination. In the second phase of the trial, the jury determined that the intentional interference with the contract was racially motivated, and it awarded Ms. Hampton $56,000 in compensatory damages and $1,100,000 in punitive damages.

"A plaintiff who lacks direct evidence of racial discrimination may rely on indirect evidence of discrimination. . . ." *Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir.1999). As noted above, because the issue of intent is one that is often not susceptible to direct proof, the jury considers all the conflicting inferences that the circumstantial evidence may present. *See Washington*, 710 F.Supp. at 1289 (citing *Rogers*, 458 U.S. at 618, 102 S.Ct. 3272). In a case where the plaintiff attempts to show intentional discrimination by indirect evidence, the court must employ "the burden-shifting framework first articulated in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Perry*, 199 F.3d at 1134; *see also Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1225 (10th Cir.2000) (noting that "[a] plaintiff alleging discrimination on the basis of race may prove intentional discrimination through either direct evidence of discrimination (*e.g.*, oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (*i.e.*, circumstantial) evidence of discrimination").

However, after a full trial on the merits, "the single overarching issue" on which we focus is whether the adverse action was motivated by race. *Tyler*, 232 F.3d at 812 (setting out approach); *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir.2000) (stating that when reviewing sufficiency of the evidence of a racial discrimination claim, "the burden shifting framework of *McDonnell Douglas* is largely irrelevant and the issue is whether the adverse employment action was motivated by race"). Thus, the sequential analysis of *McDonnell Douglas* "drops out" and "our inquiry . . . is whether there was sufficient evidence presented for the jury to infer [Dillard's] reasons were pretextual." *Tyler*, 232 F.3d at 812 & n. 4 (internal quotation marks omitted).

Dillard's contends that Officer Wilson, based on the facts and circumstances, had probable cause to stop Ms. Hampton. However, Dillard's neglects to acknowledge that the jury may have found Mr. Wilson's theory pretextual.[4]

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[4] Dillard's argues that the district court, in dismissing the plaintiffs' state law claims, determined that Mr. Wilson was credible and that he had probable cause to stop the women; therefore Ms. Hampton is precluded from arguing that Mr. Wilson's probable cause was a pretext for discrimination. But, as the district court noted, "[i]n the instant case the Court did not grant Dillard's summary judgment on plaintiff's § 1981 claim, and the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim." *Hampton*, 18 F.Supp.2d at 1266. Although the stop may have complied with state law, "[o]f course, compliance, or the lack of compliance with a state statute is not the yardstick against which to assess a claimed federal constitutional violation." *Tenenbaum v. Williams*, 907 F.Supp. 606, 618 (E.D.N.Y. 1995); *see also Alexis v. McDonald's Restaurants of Mass.*, 67 F.3d 341, 354 (1st Cir.1995) (even assuming state actor had probable cause to initiate stop, plaintiff "tender[ed] competent evidence that a state actor intentionally discriminated against her because she belonged to a protected class"); *Tanner v.. Heise*, 879 F.2d 572, 580 n. 5 (9th Cir.1989) (noting that law officers' "mere compliance with the procedural requisites of state law would not shield them from liability under section 1983").

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). As noted above, the jury's conclusions indicate it did not find Mr. Wilson's testimony credible.[5] Thus, "[o]ur holding is further fortified by our conclusions that the jury could reasonably infer all [defendant's] previous justifications were pretextual. If the jury found, as a whole [Mr. Wilson] was not credible, its decision to reject [his] proffered reason . . . is, likewise, reasonable." *Tyler*, 232 F.3d at 816.

Ms. Hampton relies primarily on indirect evidence of discrimination. In its memorandum in support of its motion for judgment as a matter of law before the district court, Dillard's defends its security policies as "racially neutral," Aplt's App. vol. 1, at 182, and contends that there was no evidence that the store's employees had a history of denying services or products to African American customers. Dillard's fails to acknowledge that the evidence of discriminatory surveillance, although on its own not actionable under § 1981, *see Lewis*, 948 F.Supp. at 370 (rejected plaintiff's theory of "an unstated, unwritten contract between

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[5] We recognize that on summary judgment the district court found no reason to doubt Mr. Wilson's credibility, but the district court did not have the opportunity to weigh Ms. Chouteau's testimony beyond that provided in her affidavit. As noted above, Ms. Chouteau's conflicting testimony may very well have been the decisive factor that tipped the scales in favor of Ms. Hampton.

commercial establishments and the public, that all who enter premises of the former will be treated equally regardless of race" because it would virtually nullify the contract requirement of § 1981), can certainly be viewed as indirect evidence of discrimination. *See Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir.1978) (stating that policy to photograph African American customers of bank "was not the isolated act of an individual employee, but rather the implementation of a policy deliberately adopted by the bank management to offer its services under different terms dependent on race"); *Washington*, 710 F.Supp. at 1289 (denying defendant's motion for summary judgment where policy of denying services to "suspicious" shoppers targeted African-Americans and stating that "[t]he issue of intent . . . is one that is often not susceptible to direct proof, and a court should consider all conflicting inferences that may be presented by the circumstantial evidence in the case").

Ms. Hampton presented multiple forms of indirect evidence of discrimination. She presented testimony from former Dillard's security officers that corroborated the racial surveillance theory. She also presented testimony that African-Americans were frequently "tracked" upon entering the store; that Dillard's implemented race "codes" that highlighted African-American shoppers as suspicious; that African-Americans were singled out as "suspicious" for returning merchandise without a receipt or for moving between departments while carrying merchandise. *See* Aplt's App. vol. 3, at 745-46, 751, 765-68, 781-85. In addition, store incident reports differentiated shoppers predominantly by race. As to Ms. Hampton specifically, she was noticed and placed under surveillance shortly after entering Dillard's. The district court also noted that Mr. Wilson's "Security Report," despite being less than two pages long, reiterated Ms. Hampton's race twelve times, reflecting implementation of the store's policy and reflecting Mr. Wilson's motivation.

Given this abundant evidence, we agree with the district court and hold that the jury's inference of racial discrimination was a reasonable one.

Finally, Dillard's and the dissent strenuously argue that there is no direct evidence or indication that Mr. Wilson acted with an intent to discriminate. As discussed above, the fact that Mr. Wilson has not admitted discrimination, however, does not mean there is no evidence of discrimination. *See Washington*, 710 F.Supp. at 1289 (rejecting argument that because no employee "admitted in his or her deposition that he or she was discriminating and no store documents reveal discriminating intent, then there is no evidence that they discriminated against plaintiffs" because plaintiffs testified that they "believe[d] they were discriminated against by the store"). As previously noted, there was ample evidence (most tellingly, Mr. Wilson's security report, which reiterated the race of the shoppers a dozen times, and testimony presented to the jury regarding the store's discriminatory coding practices) for the jury to determine that "race was a motivating factor" in Mr. Wilson's interaction with Ms. Hampton. Aplt's App. vol. 1, at 151 (Instruction 18). We therefore hold Ms. Hampton presented sufficient evidence that the reasons given by Mr. Wilson for interference with Ms. Hampton's redemption of the contract were pretextual, and the jury reasonably inferred that Dillard's intentionally discriminated against her on the basis of race. *See Tyler*, 232 F.3d at 816 (reiterating that judgment as a matter of law is appropriate only if "the evidence points but one way, and is susceptible to no reasonable inferences supporting [plaintiff's] claim").

5. Instructions

Dillard's next appeals the district court's denial of its motion for a new trial on the grounds that the district court's instructions were unfairly prejudicial. We review the trial court's denial of a motion for a new trial on the basis that the

jury's verdict is against the weight of the evidence for "a manifest abuse of discretion." *Blanke v. Alexander*, 152 F.3d 1224, 1235 (10th Cir.1998); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (noting that a federal trial court has "discretion to grant a new trial if the verdict appears to [the court] to be against the weight of the evidence") (internal quotation marks omitted). There is an abuse of discretion when "the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." *Black v. Hieb's Enters., Inc.*, 805 F.2d 360, 363 (10th Cir.1986).

Dillard's argues that the district court's instructions confused the jury as to the burden of proof and misdirected the focus of the jury's inquiry. On review, "[w]e consider jury instructions in their entirety, applying *de novo* review to determine whether the jury was misled on the applicable law." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1250 (10th Cir.2000). "Despite this standard of review, we do not require perfection, but we must be satisfied that, upon hearing the instructions, the jury understood the issues to be resolved and its duty to resolve them." *Id.* (internal quotation marks omitted).

a. Instructions 10 and 17.

In phase one of the trial, Instruction 10 set out Ms. Hampton's claims:

> Plaintiff Paula Hampton claims that defendant Dillard Department Stores, Inc., violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's, on account of her race. More specifically, plaintiff contends that defendant intentionally prevented her from redeeming a free cologne coupon which Dillard's had given her as a benefit of a purchase in its children's department.

> Ms. Hampton has the burden of proving by a preponderance of the evidence that her claims are more probably true than not true.
>
> Dillard's denies plaintiff's claims and contends that the cologne sample was a free gift, available to all store patrons, rather than a benefit with purchase.

Aplt's App. vol. 1, at 139 (Instruction 10). In phase two of the trial, the district court stated that the phase one instructions applied to the jury's deliberations, with the exception of Instruction 10. Instead, Instruction 17 set out Ms. Hampton's claims, but in a slightly different context:

> Plaintiff Paula Hampton claims that defendant Dillard Department Stores, Inc., violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's on account of her race. More specifically, plaintiff contends that defendant's surveillance, detention and search of her belongings constituted a security practice which unequally burdened her as an African-American shopper.
>
> Ms. Hampton has the burden of proving by a preponderance of the evidence that her claims are more probably true than not true.
>
> Dillard's denies plaintiff's allegations.

Id. at 150 (Instruction 17). Dillard's contends that because the above instructions focused the jury on its unrelated prior bad acts, Dillard's was unfairly prejudiced.

We hold that Instruction 17 refocused the jury: in phase one, the jury was to focus on whether the coupon was a contract and whether Dillard's intentionally interfered; in phase two, the jury's primary focus was to determine whether Dillard's acted with a discriminatory motive. The instruction echoed the pretrial order's characterization of Ms. Hampton's

claims—*i.e.*, that Dillard's engaged in disparate surveillance practices that unequally burdened African-American shoppers and violated Ms. Hampton's rights under § 1981. To allow the jury to consider the store's past conduct and practice as *indirect* evidence was not error. These instructions did not mislead the jury. To the contrary, the instructions clearly stated the correct legal standard.

b. Instruction 18.

Dillard's also contends that Instruction 18 further confused the jury, because it suggested that Ms. Hampton's race could be one of several motivating factors behind Dillard's conduct, rather than the determinative factor. Instruction 18 presented the essential elements that Ms. Hampton had to prove to establish her claim of race discrimination under § 1981:

> In order to establish her claim of race discrimination under 42 U.S.C. § 1981, plaintiff must prove the following essential elements are more probably true than not true:
>
> First, that plaintiff was entitled to a free cologne sample as a benefit or privilege of her purchase on April 5, 1996;
>
> Second, that defendant intentionally interfered with plaintiff's right to enjoy the benefits and privileges of that purchase; and
>
> Third, that plaintiff's race was a motivating factor in defendant's conduct.
>
> Because you have already resolved the first two issues in favor of plaintiff, you need only address the third element. On this issue, plaintiff does not have to prove that defendant was motivated only by plaintiff's race, but she must prove that her race was a motivating factor in defendant's decision, that is, that defendant acted, at least in part, because of plaintiff's race.

A "motivating" factor means that but for its unlawful motive, defendant would not have denied plaintiff the right to enjoy the benefits and privileges of her purchase. In other words, you must find that race was at least one of the factors which motivated Officer Wilson to interfere with plaintiff's redemption of the cologne sample. A motivating factor need not be the sole or exclusive reason, however, for Wilson's actions.

While plaintiff must show that defendant intentionally discriminated against her, she is not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of other facts and may be inferred from showing that defendant's explanation is unworthy of belief.

If plaintiff proves her claim by a preponderance of the evidence, you must return a verdict in favor of plaintiff. If plaintiff does not prove her claim by a preponderance of the evidence, you must decide this claim in favor of defendant.

Aplt's App. vol. 1, at 151-52 (Instruction 18).

Instruction 18 merely restated § 1981's elements and recited the jury's verdict from the first phase of the trial: that Ms. Hampton was entitled to a free cologne sample as a benefit of her purchase and that Dillard's intentionally interfered with her ability to receive a free cologne sample. *See id.* at 147 (verdict form from phase one of trial). The instruction properly stated that the plaintiff bears the burden of establishing that race was a motivating factor in the defendant's decision to discriminate. *See Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1282 (10th Cir.1999) (noting it is "[p]laintiff's ultimate responsibility [to] persuad[e] the jury that race was a motivating factor in the employment decision"). Because we consider jury instructions as a whole in connection with all other instructions given, *see Hall v.*

Western Prod. Co., 988 F.2d 1050, 1058 (10th Cir.1993) ("The appellate court reviews the jury instructions as a whole, not by reviewing single jury instructions."), we hold defendant's argument that Instruction numbers 17 or 18 misled the jury to be without merit.

c. Instruction 19.

Dillard's further argues that the court erroneously instructed the jury to focus on its discriminatory practices when making its apportionment of actual damages. In part, Instruction 19 stated that "[t]he burden is on [the] plaintiff to prove by a preponderance of the evidence the existence and amount of her damages and the fact that defendant's unlawful conduct proximately caused her damages." Aplt's App. vol. 1, at 153. Dillard's contends that the jury's consideration of all of its "unlawful conduct" would include Dillard's allegedly discriminatory surveillance tactics and consequently distorted the award. Because Dillard's did not preserve this issue for review, we review for plain error. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1190 (10th Cir.1997). In order to find plain error we would have to conclude that the instruction was "patently-plainly erroneous and prejudicial." *Id.* (internal quotation marks omitted). We doubt whether this instruction was error, and even if it were, we also doubt that the error would be "patently plainly erroneous and prejudicial." *Id.* We therefore hold that the jury was properly instructed as to the damages it could award and that the instructions did not allow the jury to consider impermissible theories.

d. Proposed Instructions Regarding Summary Judgment.

Finally, Dillard's argues that the district court erred by refusing to give a proposed instruction regarding the district court's grant of summary judgment to Dillard's on the plaintiffs' false imprisonment claims. Specifically, Dillard's contends that the district court's summary judgment ruling

conclusively established that Mr. Wilson acted with probable cause when he stopped Ms. Hampton and Ms. Cooper and that he stopped them at the nexus of the store and the mall.

"Under Rule 56(d), summary adjudication of only some of the claims imposes a duty on the trial court to 'if practicable' articulate what facts are established and which remain controverted." *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1548 (10th Cir.1992). Here, the district court granted summary judgment to Dillard's on the false imprisonment claims and a subset of the § 1981 claims, but allowed the § 1981 claim based upon the coupon to proceed. We agree with the district court that "that record is different from the record which [was developed before trial on the coupon claim] and the Court's summary judgment order is immaterial." Aplt's App. vol. 4, at 1184 (Tr. of instruction conference).

As noted above, even if the stop complied with state law, Dillard's is not necessarily shielded from liability under § 1981. *See Tanner*, 879 F.2d at 580 n. 5 ("mere compliance with the procedural requisites of state law would not shield [officers] from liability under § 1983"). Furthermore, there were no findings in the summary judgment order as to Mr. Wilson's subjective beliefs and the store's policies allegedly based on them.

Section 1981 is a unique and powerful statute that focuses on motivation behind a particular action. Whether Mr. Wilson committed a state tort in his fruitless search of Ms. Hampton's belongings is not dispositive of why he targeted her in the first place. For those reasons, the jury was entitled to consider, along with Mr. Wilson's testimony, the testimony of Ms. Chouteau, Ms. Hampton and Ms. Cooper, and the demonstrative evidence. The district court's instruction properly stated the law regarding the issues before the jury and the district court did not abuse its discretion when it refused to give the store's proposed instruction.

6. Admission of Irrelevant and Prejudicial Evidence/ Exclusion of Exculpatory Evidence

Dillard's also sought a new trial arguing that the cumulative effect of the district court's erroneous evidentiary rulings merits a reversal. We review evidentiary rulings for an abuse of discretion. *See Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir.1995). The store's argument centers around the contention that Ms. Hampton's § 1981 claim was exceedingly narrow and therefore the admission of testimony regarding surveillance tactics and loss prevention practices was prejudicial and confusing to the jury.

Dillard's relies upon a continuing objection to opinion testimony about racism by the officer witnesses. The record does not indicate that Dillard's objected to all of the challenged testimony at trial. A party must make a timely and proper objection to preserve an alleged error for appeal. *See United States v. Herndon*, 982 F.2d 1411, 1414 (10th Cir.1992). Failure to so object "constitutes waiver of the issue unless there is plain error resulting in manifest injustice." *Id.* at 1414-15. Whether under an abuse of discretion or plain error review, we conclude that there was no error.

Dillard's focuses on several areas of allegedly prejudicial testimony: (1) testimony that Officer Wilson's supervisor used racial epithets in his previous position as director of security for another employer, (2) testimony by former Dillard's security officers as to training they received regarding treatment of minority shoppers; (3) testimony regarding the racial makeup of Dillard's shoppers and shift logs and arrest reports; (4) lay opinion testimony about Dillard's security officers; and (5) testimony that dated back approximately twenty years as to Officer Wilson's disciplinary proceeding and suspension. In addition, Dillard's

contends that the court erred when it excluded Ms. Hampton's handwritten complaint that she filed with the customer service department after the incident.

The first three alleged evidentiary errors, taken separately or in the aggregate, do not warrant reversal. The use of racial epithets by Mr. Wilson's former supervisor, training practices of the store, its shift incident logs and arrest reports may be viewed as indirect evidence of discriminatory animus. As previously stated, "a § 1981 plaintiff alleging racial discrimination may prove intentional discrimination through either direct or circumstantial evidence." *Tyler*, 232 F.3d at 812. Dillard's had every opportunity to rebut all of the above admitted evidence but instead relied upon its "continuing objection" to all opinion testimony not rationally based on personal knowledge. Aplt's. App. vol. 3, at 713. We hold that the district court did not abuse its discretion.

As to the testimony regarding Officer Wilson's suspension from the Kansas Highway Patrol for falsifying a report in 1977, the district court determined that although the event was remote in time, because it was probative of Mr. Wilson's character for truthfulness, and because Mr. Wilson was able to explain the incident, the court would allow the questioning. The district court did not abuse its discretion in allowing this line of questioning and in allowing the jury to give it appropriate weight. Federal Rule of Evidence 608(b) provides: "Specific instances of the conduct of a witness . . . may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. . . ." Fed.R.Evid. 608(b). One key aspect of this rule is that its application is explicitly within the discretion of the district court. The court did not abuse its discretion.

Finally, Dillard's contends that the district court erred when it excluded Ms. Hampton's written complaint to the store, made immediately after her interaction with Mr.

Wilson. Dillard's alleges that the report was an admission against Ms. Hampton's interest, it closely tracked Mr. Wilson's story, and made no intimation of racial discrimination. The record indicates that Dillard's counsel planned to offer specific facts that were admissions against interest in the report. In fact, Dillard's counsel was able to cross-examine Ms. Hampton thoroughly about the written complaint. Furthermore, Ms. Hampton testified that nothing in the complaint suggested that she believed the interference with her redemption of the coupon was racially motivated. *See* Aplt's App. vol. 3, at 837 (testimony of Ms. Hampton). We hold that Dillard's was not prejudiced by the exclusion of the complaint.

Dillard's also contends the cumulative effect of the errors they appeal unduly prejudiced their case. As we have found no error, there can be no compound effect.

7. Damages

a. Compensatory Damages

Dillard's contends that the compensatory damages award of $56,000 is not supported by the evidence and must be set aside. When a party complains there was insufficient evidence to support a damage award, we must determine whether the damage award is supported by substantial evidence. *See Baty v. Willamette Indus.*, 172 F.3d 1232, 1243 (10th Cir.1999). We view the evidence in the light most favorable to the prevailing party. *See Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1551 (10th Cir.1996).

Dillard's states that any emotional damages Ms. Hampton suffered resulted from Mr. Wilson's belief that her niece was shoplifting and not from any alleged § 1981 interference with her contract. In addition, Dillard's contends that Ms. Hampton's emotional distress, if any, is unsupported by the record.

Ms. Hampton counters that the damages from the accusation and interference with the contract were substantial: she felt humiliated and disgraced by the accusations. Clearly the accusation, though directed at her niece, implicated her as part of the entourage in the dressing room. In addition, Ms. Hampton claims that she, too, was accused of stealing. She contends that her emotional damages were immediately evident, as she was visibly upset after the incident, as well as lasting, as she is now unable to shop with her children for fear of future ridicule and humiliation. Ms. Hampton also claimed her daughter had repeated nightmares regarding the incident.

We note first that any economic damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible. Our review of compensatory damages is limited to Ms. Hampton's testimony regarding her emotional suffering. *See Karnes v. SCI Colo. Funeral Servs.*, 162 F.3d 1077, 1080 (10th Cir.1998) (noting availability of compensatory and punitive damages under § 1981). Ms. Hampton testified as to her emotional distress and that of her daughter. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir.1998) (noting that, in a § 1981a discrimination case, victim's "testimony of anxiety, sleeplessness, stress, marital hardship and loss of self-esteem was sufficiently detailed to preclude us from holding that the district court abused its discretion in its award of compensatory damages"). Ms. Hampton's testimony here was similarly detailed. As the district court noted:

> [I]n this case plaintiff gave eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children, that she was too emotionally distraught to drive, and that she had to call her husband for a ride home. Immediately after the incident she was crying and she was so upset that she could not write out a customer comment card, and a Dillard's employee

> filled it out for her. She testified that "I don't feel that my life will ever be the same." The jury was entitled to credit this testimony and to compensate plaintiff accordingly.

Hampton, 18 F.Supp.2d at 1275-76 (citations omitted). We conclude that the award of compensatory damages was well within the district court's discretion.

b. Punitive Damages

Dillard's also seeks to reduce or eliminate the $1.1 million punitive damage award. Dillard's argues that there was insufficient evidence for the jury to conclude that the defendant discriminated against plaintiff willfully or maliciously, which is required for an award of punitive damages under § 1981. *See EEOC v. Gaddis*, 733 F.2d 1373, 1380 (10th Cir.1984). It also asks us to conclude as a matter of law that the punitive damage award is excessive.

(1) Award of Damages

"In the Tenth Circuit, the standard for punitive damages for discrimination in violation of federal civil rights is that the discrimination must have been 'malicious, willful, and in gross disregard of [plaintiff's] rights.'" *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir.1989) (quoting *Gaddis*, 733 F.2d at 1380). "'The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact.'" *Gaddis*, 733 F.2d at 1390 (internal quotation marks omitted).

Based on the testimony presented, the jury could reasonably find that Dillard's took part in the intentional discriminatory conduct. *See id.* at 1379 (holding that trial

court's finding of intentional discrimination was correct and noting that "[w]here the evidence supports a conclusion either way the choice between two permissible views of the weight of the evidence is not clearly erroneous") (internal quotation marks omitted). The jury found Ms. Hampton's witnesses credible. The jury also weighed testimony regarding the store's training policies, its incident reports, its close observation of African-American customers who were engaging in objectively innocent behavior, and its arrest reports. The jury's findings as a whole are sufficient to establish that the discrimination by Dillard's, acting through Mr. Wilson, was malicious, willful, and in gross disregard of Ms. Hampton's rights. We will not disturb the decision to award punitives.

(2) Amount of Damages

Dillard's also argues that the severity of the punitive damage award violates its constitutional right to due process. "One must receive fair notice both that certain conduct will subject him to punishment, and the possible severity of the punishment that may be imposed." *Deters*, 202 F.3d at 1272 (affirming punitive damage award for sexual harassment claims pursued under Title VII). The Supreme Court has outlined three guideposts to determine whether a defendant has received fair notice. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). "First, and most important, is the reprehensibility of [the] defendant's conduct." *Deters*, 202 F.3d at 1272. Next is the ratio of the punitive damage award to the compensatory damage award. *See id.* at 1272. Third is the measure of the punitive damage award in relation to awards for comparable misconduct. *See id.* We also must keep in mind the deterrent goal of punitive damages in conjunction with the impact the size of the award will have on a defendant and with the wealth and size of the defendant as relevant factors. *See id.*

The availability of punitive damages under § 1981 is well established. *See Johnson v. Railway Express Agency, Inc.*,

421 U.S. 454, 459-60, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) ("[Section] 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."). Applying the three factors—reprehensibility, ratio, and comparability—to this case, we are unpersuaded by the store's arguments. Dillard's had ample notice it was subject to punitive damages for conduct that was malicious, willful, and in gross disregard of plaintiff's rights.

a. Reprehensibility

Dillard's argues that it is authorized to engage in reasonable loss prevention activity and that, during the five-minute episode, Ms. Hampton was "free to leave" at any time. Aplt's Br. at 46. Dillard's suggests that the reprehensibility of its conduct is further minimized because Ms. Hampton "had shopped at Dillard's hundreds of times, but was stopped only this once." *Id.* Finally, Dillard's purports its surveillance tactics involved no verbal or physical abuse, and thus are inappropriate for punitive damages.

As discussed above, the jury was presented with evidence about the coding and close surveillance of African-American shoppers. The jury must have agreed with Ms. Hampton that the store's surveillance tactics are particularly reprehensible.

b. Ratio

Dillard's next contends that the punitive damages ratio of approximately 20 to 1 is impermissibly excessive and unconstitutionally disproportionate. Dillard's relies primarily on the *BMW* Court's admonitions regarding economic damage cases, where a ratio of 10:1 was cited with approval. *See BMW*, 517 U.S. at 581, 116 S.Ct. 1589 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-462,

113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). Ms. Hampton counters that in cases where "'the injury is hard to detect [and] the monetary value of noneconomic harm . . . [is] difficult to determine,'" a higher ratio of punitive damages to compensatory damages is justified. *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir.2000) (quoting *BMW*, 517 U.S. at 583, 116 S.Ct. 1589).

As stated above, the economic injury suffered here was nominal, but the actual injury is more difficult to quantify. "[B]oth the Supreme Court and this court acknowledge that low awards of compensatory damages may support a higher ratio if a particularly egregious act has resulted in a small amount of economic damages. Additionally, . . . where the injury is primarily personal, a greater ratio [than 10:1] may be appropriate." *Deters*, 202 F.3d at 1273 (citations omitted). Looking at the harm that might result from the store's conduct in relation to the harm that actually occurred, *see BMW*, 517 U.S. at 581, 116 S.Ct. 1589, and eschewing mathematical formulae, *see id.* at 582, 116 S.Ct. 1589, we hold that the punitive damage award in this case is justified. *See United States v. Big D Enters., Inc.*, 184 F.3d 924, 934 (8th Cir.1999) (upholding maximum punitive damages award in Fair Housing Act case and stating that "[t]he punitive damage award in this case . . . reinforces the nation's commitment to protecting and preserving the civil rights of all"); *see also Deters*, 202 F.3d at 1273 (stating that "[w]e are not persuaded that the ratio between compensatory [damages of $5,000] and punitive damages [of $295,000 as adjusted under Title VII] . . . is unconstitutionally disproportionate").

c. Sanctions for Comparable Misconduct

The third prong of inquiry further supports our holding. Section 1981 does not have a statutory cap that limits punitive damages as does Title VII. *See* 42 U.S.C. § 1981a(b)(1). As stated above, few § 1981 claims involve retail transactions, and fewer reach trial. We thus consider whether the award

would "shock the judicial conscience, and constitute a denial of justice." *Deters*, 202 F.3d at 1273 (internal quotation marks omitted). Dillard's does not argue that the award would "result in [its] financial ruin" or that the award is a disproportionally large percentage of its net worth. *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir.1997) (internal quotation marks omitted); *see also Deters*, 202 F.3d at 1273 (affirming punitive damages award with ratio of 59 to 1 in a sexual harassment case); *Big D Enters.*, 184 F.3d at 933 (noting that, in weighing *BMW* factors, "the reprehensibility of [defendant's] conduct more than justifies the punitive damage award"). Because the reprehensibility of the store's conduct as found by the jury was particularly offensive, and the resulting punitive damage award was therefore reasonable, we conclude that the district court did not err in refusing to reduce the punitive damage award.

B. Ms. Cooper's § 1981 Claim

On appeal, Ms. Cooper seeks reversal of the district court's grant of summary judgment to Dillard's on her § 1981 action. She contends that (1) receipt of the coupon from the Dillard's clerk created a promise owed to her; or, alternatively, (2) she is a third-party beneficiary of the contract between Ms. Hampton and Dillard's and, as such, is entitled to redemption of the coupon. She also asserts that the district court improperly resolved credibility and intent issues when it granted summary judgment to Dillard's.

1. Standard of Review

"We review the district court's grant of summary judgment de novo, applying the same legal standard as the court below." *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir.2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "In applying this standard, we examine the factual record and draw reasonable inferences therefrom in a light most favorable to the nonmoving party." *Munoz*, 221 F.3d at 1164.

2. The Coupon as a Contract Between Ms. Cooper and Dillard's

We agree with the district court that Ms. Cooper's receipt of the coupon did not establish a contractual relationship between Ms. Cooper and Dillard's. In this regard, we refrain from adopting Amicus Curiae's (Lawyers' Committee for Civil Rights Under Law) expansive interpretation that § 1981 broadens the scope of relevant civil rights and protects customers from harassment upon entering a retail establishment. Although Amicus Curiae proposes an arguable application, § 1981 is limited to remedy "any act of discrimination committed in the making or the performance of a contract." 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). We note that the statute's formulations are not "exhaustive," H.R.Rep. No. 102-40(II), at 37 (1991), and a broader interpretation might discourage intolerable harassment in the retail setting based on unfounded racial biases. But we cannot extend § 1981 beyond the contours of a contract. We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping. *See Morris*, 89 F.3d at 415 (noting that, where claim was interference with prospective contractual relations, "[w]hile the incident . . . was unfortunate and undoubtedly disconcerting and humiliating, it does not constitute a violation of the statutes"); *Wesley*, 42 F.Supp.2d at 1201 (granting summary judgment where there was no evidence "that plaintiff would have attempted to purchase a car from the dealership if the agents had not chased her away"); *Sterling v.*

Kazmierczak, 983 F.Supp. 1186, 1192 (N.D.Ill.1997) (granting defendant's motion to dismiss where plaintiff failed to allege that he was prepared to purchase air rifle cartridges or that he had them "in hand" when confronted by police officer); *Lewis*, 948 F.Supp. at 371 (granting summary judgment to defendants and rejecting theory that an unwritten contract between commercial establishments and the public guarantees that whenever a member of the latter enter "premises of the former [she] will be treated equally regardless of race"); *Robertson*, 848 F.Supp. at 81 (dismissing claim where "plaintiff was not denied admittance or service"); *cf. Bobbitt*, 19 F.Supp.2d at 519 (denying defendant-restaurant's motion to dismiss where plaintiffs alleged that restaurant required plaintiffs to prepay, thereby changing an essential term of the customer/restauranteur contract because of race).

Because there is no dispute as to a material fact regarding Ms. Cooper's failure to make or attempt to make a purchase at Dillard's, we hold that the district court correctly dismissed Ms. Cooper's claims as a matter of law.

3. Third-Party Beneficiary

In the alternative, Ms. Cooper argues that, as the recipient of the purchased clothing and as a part of the shopping party, her receipt of the coupon conferred upon her the status of a third-party beneficiary. We disagree.

"A contract is a stipulation *pour autrui* [for others] if it clearly reveals that the intent of the contracting parties was to provide a benefit to a third party." *Wallace v. Texaco, Inc.*, 681 F.2d 1088, 1090 (5th Cir.1982). Ms. Cooper's presence at the register was fortuitous and, as noted above, her receipt of the coupon from the sales clerk did not dilute Ms. Hampton's § 1981 claim. However, an incidental benefit is not enough to confer contractual rights under the contract; there must also be consideration for the contract. *See id.*

("The benefit to the third party must be more than merely incidental to the contract; it must be part of the condition or consideration for the contract.").

The "[p]erformance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . , no duty to him is created." *Restatement (Second) of Contracts*, § 302 cmt. e. An incidental beneficiary is a person who will be benefitted by performance of a promise but who is neither a promisee nor an intended beneficiary. *See Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir.1981) (noting that, under federal common law, "[i]f the agreement was not intended to benefit the third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract").

Undoubtedly, Ms. Cooper, as a third party, derived some benefit from the contract between Ms. Hampton and Dillard's. This derivation of benefit does not, however, automatically render the contract a third-party beneficiary contract, as it reaches beyond the intent of the contracting parties. Ms. Cooper was simply an incidental beneficiary. *See id.* Merely because she may have derived a benefit, purely incidental and not contemplated by the contract between Ms. Hampton and Dillard's, does not entitle her to sue to enforce the contract.

4. Credibility and Intent

Lastly, Ms. Cooper contends that the district court prematurely disposed of her § 1981 claim and her state law false imprisonment claim and made credibility and factual determinations that should have been made by the jury. As to her § 1981 claim, there is no legitimate factual dispute as to whether Ms. Cooper attempted to purchase an item from Dillard's. Because we have held as a matter of law that Ms. Cooper is not a third-party beneficiary of the contract

between Ms. Hampton and Dillard's, her claim as to outstanding credibility determinations raises no material facts.

As to her false imprisonment claim, we agree with the district court that Mr. Wilson's statement to Ms. Hampton that she needed to calm down or he would call the Overland Park Police, does not constitute false imprisonment. *See Thompson v. General Fin. Co.*, 205 Kan. 76, 468 P.2d 269, 280 (1970) (listing elements of false imprisonment claim); *see also Wright v. Montgomery Ward & Co.*, 814 F.Supp. 986, 989 (D.Kan.1993) (discussing false imprisonment under Kansas law). Ms. Cooper has failed to state a claim as a matter of law and we affirm the district court's grant of summary judgment as to all of Ms. Cooper's claims.

III. ANALYSIS OF CASE NO. 98-3306

In a companion case, Dillard's raises two arguments in its effort to overturn the district court's determination that Ms. Hampton was entitled to attorney's fees and expenses in the amount of $141,192.50 pursuant to 42 U.S.C. § 1988. First, Dillard's disputes the district court's conclusion that Ms. Hampton is the "prevailing party" below. Second, Dillard's contends that Ms. Hampton received fees for unrelated and unsuccessful state law and § 1981 claims that were dismissed by the district court. We review the district court's award of attorney's fees and expenses for an abuse of discretion. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995). For the reasons set forth below, we affirm the district court's award.

As to the first argument, because we have determined above that Ms. Hampton prevailed below on her § 1981 claim based upon her rights under the coupon, no further discussion is required. As to the unrelated and/or dismissed claims, Dillard's contends that fees incurred and costs spent in connection with Ms. Hampton's state law false imprisonment claim and Ms. Hampton's dismissed § 1981 claim, as well as

Ms. Cooper's dismissed claims, should not be awarded. We disagree.

> If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on a significant, interrelated claim. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."

Id. at 1512 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Rather, a court should focus on whether the party "'succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)).

Here, all of the claims in this case were very similar and stemmed from the same set of facts. "There was . . . one bundle of evidence and there was substantial success for the Plaintiff." *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 412 (10th Cir.1993). Any consequent fee reduction would be a difficult and unjust division of the hours expended on a claim-by-claim basis. *See Hensley*, 461 U.S. at 435, 103 S.Ct. 1933 ("Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis."). In *Tidwell*, we refused to allow a district court to reduce attorney's fees for a plaintiff who prevailed on an Equal Pay Act claim but failed on her Title VII and state law claims. *See Tidwell*, 989 F.2d at 412-13. We concluded that, instead of following a claim-by-claim success basis, under § 1988 the focus should be on the "significance of the overall relief obtained by [the] plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933; *see also Zuchel v. City & County of Denver*, 997

F.2d 730, 744 (10th Cir.1993) ("[T]he Supreme Court has made clear that when, as here, two claims are interrelated and the plaintiff obtains excellent results on one of those claims, a fully compensatory fee should usually be awarded."). Here, it is undisputed that Ms. Hampton "has obtained excellent results" and as such, her "attorney[s] should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933. The district court's award of attorney's fees and expenses was well within its discretion.

IV. CONCLUSION

For the reasons stated above we AFFIRM the district court's denial of Dillard's motion for judgment as a matter of law and motion for a new trial; we AFFIRM the district court's award of compensatory and punitive damages; we AFFIRM the district court's grant of summary judgment dismissing Ms. Cooper's claims; and we AFFIRM the district court's award of attorney's fees to Ms. Hampton.

ANDERSON, Circuit Judge, dissenting:

I agree with the majority opinion that the district court correctly dismissed Ms. Cooper's claims against Dillard. However, because I believe that no § 1981 violation occurred in connection with Ms. Hampton's interaction with Dillard employees either, I would reverse the district court's denial of Dillard's motion for judgment as a matter of law and overturn the jury verdict in favor of Ms. Hampton.

I realize that we do not lightly overturn jury verdicts. We may only do so if "there is no legally sufficient evidentiary basis . . . with respect to a claim." *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.1996). I believe Dillard has met that burden in this case. I therefore respectfully dissent.

I assume for the sake of argument that the coupon is a benefit or privilege of Ms. Hampton's contractual relationship with Dillard. Bearing in mind that § 1981 requires purposeful and discriminatory conduct, there is absolutely *no* evidence that Mr. Wilson intentionally interfered with her redemption of that coupon when he approached her and Ms. Cooper, based upon probable cause to suspect that Ms. Cooper had shoplifted, and asked to look in Ms. Hampton's bag at a location near the store exit.

Indeed, there is no evidence that, when Mr. Wilson approached Ms. Hampton and Ms. Cooper and asked to examine the shopping bag, he *even knew* that they were redeeming fragrance coupons. When questioned about the incident at trial, Mr. Wilson testified as follows:

> Q: What did you think Paula Hampton and Demetria Cooper were doing when you approached them?
>
> A: They were getting ready to exit the Dillard's store to go out into the mall.
>
> Q: Okay. Did you notice that they were speaking with a cosmetic associate or a fragrance consultant when you approached the two ladies?

A: No, I did not.

Q: Did you knowingly prevent Paula Hampton from receiving a free cologne sample?

A: No, I did not.

Q: Did you intend to interfere with Paula Hampton obtaining a free sample of cologne on April 5th, 1996?

A: No.

Q: Did you have any desire to prevent Paula Hampton from obtaining a free sample of cologne on April 5th, 1996?

A: No, I did not.

Q: Did Ms. Hampton ever tell you that you interfered with her receiving a free sample of cologne on that date, April 5th, 1996?

A: No, she did not.

Wilson test., Dillard App. Vol. 3 at 634. Plaintiffs produced no—absolutely zero—evidence to refute Mr. Wilson's testimony on that point and there is nothing in this record showing that he intended to interfere with their redemption of the fragrance coupons. And while the majority correctly notes that credibility determinations are within the jury's province, I note that the district court, in concluding Mr. Wilson had probable cause to suspect plaintiffs of shoplifting, specifically stated that plaintiffs "cite no evidence which seriously calls into question . . . Wilson's credibility." *Hampton v. Dillard Dep't Stores, Inc.*, 985 F.Supp. 1055, 1061 (D.Kan.1997). Nothing in Ms. Hampton's or Ms. Cooper's testimony remotely suggests that Mr. Wilson's conduct towards them indicated an intention to prevent either plaintiff from redeeming the fragrance coupons. All the evidence in this case points one way only: that Mr. Wilson's interference with Ms. Hampton's redemption of her fragrance coupon was purely fortuitous, incidental and completely collateral to the only thing Mr. Wilson intentionally did—i.e., stop and question Ms. Hampton and Ms. Cooper briefly

before they left the store because he had probable cause to believe one of them had shoplifted merchandise.

My conclusion is further supported by the fact that there is no evidence that either Mr. Wilson's or plaintiffs' conduct, or Ms. Hampton's damages arising from her encounter with Mr. Wilson, would have been different in any way had Ms. Hampton already received her fragrance sample. There is no evidence that anything at all in this case would have been different had Mr. Wilson intercepted plaintiffs before, during or after they redeemed their fragrance coupons. In other words, all the evidence indicates that it was the wrongful accusation of shoplifting, not the denial of her free fragrance sample, which caused Ms. Hampton's alleged injuries. But § 1981 does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit.

Further, the interference with the contract benefit (the fragrance coupon in this case) must be racially motivated. The majority acknowledges that discriminatory surveillance, while reprehensible, is not itself actionable under § 1981. Thus, to succeed on her § 1981 action in this case, Ms. Hampton must prove that Mr. Wilson's interference with her redemption of the fragrance coupon was itself racially motivated. My review of the record reveals no legally sufficient evidence of such racial motivation in Mr. Wilson's interaction with Ms. Hampton. Even if the original surveillance of plaintiffs was race-based, any claim that Mr. Wilson's stop and questioning of them was race-based is utterly inconsistent with the district court's specific finding, amply supported by the evidence in this case, that Mr. Wilson had probable cause to stop and question them. The existence of probable cause was a wholly sufficient reason to stop the plaintiffs.[1]

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[1] Indeed, there is no evidence that Dillard security personnel, or Mr. Wilson, treated white customers about whom they had probable cause to suspect shoplifting any differently than they treated black customers.

Additionally, there was no evidence surrounding the particulars of the stop that suggests Mr. Wilson stopped and questioned plaintiffs on the basis of race. There is no evidence that Mr. Wilson made any racially derogatory remarks or acted or conducted himself in any way which suggested that he was preventing plaintiffs from redeeming their fragrance coupons because they were African-American. There is no evidence that he had *ever* said or done anything suggesting he was racist or treated African-Americans differently from white customers. Indeed, there is no evidence that he handled this particular investigation into shoplifting any differently from any other shoplifting investigation involving any other store patrons, of any racial background. Ms. Hampton herself testified that she had frequently shopped at Dillard, had made numerous purchases there without incident, and there was absolutely no evidence that Dillard in any way had ever discouraged her, or wished to discourage her, from patronizing its store.

In sum, Ms. Hampton's § 1981 claim hangs on the thread that the free fragrance coupon given to her following her purchase was a benefit of her contractual relationship with Dillard, and that Mr. Wilson, intentionally and with discriminatory animus, interfered with her redemption of that coupon. Because the evidence in this case clearly demonstrates that any interference by Mr. Wilson with Ms. Hampton's coupon redemption was completely unintentional, accidental, and in no way based upon her race, but only resulted from the fortuity that the fragrance counter was near a store exit, I would find that there is no legally sufficient evidence supporting the jury's verdict in favor of Ms. Hampton.

APPENDIX B

UNITED STATES DISTRICT COURT
D. KANSAS

No. CIV.A. 97-2182-KHV.

PAULA DARLENE HAMPTON,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

Aug. 27, 1998

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiff Paula Hampton filed suit against Dillard Department Stores, Inc. ("Dillard's"), alleging that as part of Dillard's pattern and practice, its security officer, Tom Wilson, discriminated against her on the basis of race in violation of 42 U.S.C. § 1981.[1] Specifically, plaintiff claimed that Dillard's deprived her of her right to enjoy all benefits, privileges, terms and conditions of her contractual relationship with Dillard's. After a four day trial, the jury returned a verdict in favor of plaintiff, awarding $56,000 in compensatory damages and $1,100,000 in punitive damages. The

[1] Hampton also alleged that Wilson falsely imprisoned her in violation of Kansas law, but the Court granted summary judgment for Dillard's on this claim. Demetria Cooper, plaintiff's niece, joined in the complaint. The Court granted summary judgment for Dillard's on all of her claims. *See* 985 F.Supp. 1055, 1061 (D.Kan.1997), and *Minute Order Dismissing All Claims Of Plaintiff Cooper* (Doc. # 146).

Court entered judgment in accordance with the verdict. The matter now comes before the Court on defendant's *Motion For Judgment As A Matter Of Law, Or Alternatively For A New Trial Or Remittitur* (Doc. # 150) filed December 19, 1997.

Judgment As A Matter Of Law Standards

Judgment as a matter of law under Rule 50(b) "should be cautiously and sparingly granted." *Zuchel v. City and County of Denver*, 997 F.2d 730, 734 (10th Cir.1993). The Court must affirm the jury's verdict if "viewing the record in the light most favorable to [the nonmoving party], there is evidence upon which the jury could properly return a verdict for [the nonmoving party.]" *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.1996). The Court does not "weigh the evidence, pass on the credibility of the witnesses, or substitute [its] conclusions for that of the jury." *Id.* The Court must enter judgment as a matter of law in favor of the moving party, however, if "there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law." *Id.* at 1546-47 (quoting Fed.R.Civ.P. 50(a)). A legally sufficient basis requires more than a "scintilla of evidence" favoring the nonmoving party. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir.1988).

New Trial Standards

The decision to grant a motion for new trial is committed to the trial court's sound discretion. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir.1997). In considering a motion for new trial, the Court must view the evidence in the light most favorable to the prevailing party. *See Joyce v. Davis*, 539 F.2d 1262 (10th Cir.1976); *Neyman v. United Telecomm., Inc.*, 1992 WL 97808, Case No. 90-2033 (D. Kan. April 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir.1993). "[T]he party seeking to set aside a jury verdict

must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence." *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir.1983). The Court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (further quotation and citation omitted).

Evidentiary Standards

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed. R. Evid. 103; *see also Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir.1995) ("error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error") (further quotations and citation omitted). A new trial should be granted, however, when the erroneous admission of evidence affected the substantial rights of the parties. *See* Fed.R.Civ.P. 61.

Jury Instruction Standards

The decision whether to give a particular jury instruction is within the sound discretion of the Court. The instructions as a whole must provide correct statements of the governing law and provide the jury with an ample understanding of the issues and applicable legal standards. *Allen v. Minnstar*, 97 F.3d 1365, 1368 (10th Cir.1996). The question is not "whether the charge was faultless in every particular, but whether the jury was misled in any way and whether it had understanding of the issues and its duties to determine these issues." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1454 (10th Cir.1997) (further quotations and citations omitted).

Factual Background

The Court first briefly summarizes the facts in this case, reserving a more detailed description of the evidence for later discussion of specific issues raised by Dillard's:

Plaintiff, an African-American woman, was shopping for an Easter outfit for her infant nephew on Good Friday, April 5, 1996. She, her niece Demetria Cooper, and four children went to the Dillard's store in Overland Park, Kansas, for this purpose. Shortly after they entered the store, Tom Wilson, a Dillard's security officer, took notice. He observed them for more than 15 minutes. He then asked fellow employee Pam Fitzgerel to continue the surveillance in a fitting room in the children's department, where plaintiffs were trying clothing on Cooper's one-year-old son. At trial, Fitzgerel claimed that Cooper was holding a rolled-up cloth item in the fitting room; that she later saw an item under Cooper's jacket; and that she therefore contacted Wilson and told him that she was positive that Cooper had put something under her coat.

The group left the fitting room. Plaintiff purchased an outfit for Cooper's son and when she did so, the sales associate gave plaintiff and Cooper coupons which were redeemable at the fragrance counter for cologne samples. Plaintiff's party then ventured to the fragrance counter, which is located at the nexus of Dillard's and the Oak Park Mall, to redeem their fragrance coupons. *See Hampton v. Dillard Dep't Stores, Inc.*, 985 F.Supp. 1055, 1057 (D.Kan.1997). Wilson interrupted plaintiff, however, as she was redeeming her coupon and talking with fragrance consultant Betty Chouteau. Wilson asked to look inside the Dillard's bag and emptied the contents on the fragrance counter. Wilson checked the items and the receipt, which matched. During this exchange plaintiff became upset and told Wilson that she did not appreciate being accused of shoplifting, that she spent a lot of money at Dillard's and that she did not deserve to be treated this way. Wilson told her to calm down or he would

call the Overland Park police and have her removed from the store. Plaintiff asked Wilson his name and the location of the customer service counter. She proceeded to the customer service counter and had no more contact with Wilson.

At trial, plaintiffs presented evidence that Dillard's had a pattern and practice of subjecting African-American shoppers to disparate security practices, and argued that Wilson's surveillance, stop, detention and search were a part of that pattern and practice.

ANALYSIS

Dillard's asserts that it is entitled to judgment as a matter of law because plaintiff produced legally insufficient evidence that (1) she received a coupon for free cologne as a benefit or privilege of the contractual relationship; (2) Dillard's intentionally interfered with plaintiff's right to redeem the coupon; and (3) Dillard's intentionally discriminated against plaintiff on the basis of race. Alternatively, Dillard's asserts it is entitled to a new trial because (1) bifurcation of the contract issue and the discrimination issue prejudiced its right to a fair trial; (2) the Court erred in admitting numerous items of evidence; (3) the Court erred in instructing the jury; and (4) the damage award demonstrated passion and prejudice. Finally, Dillard's asserts that the evidence did not warrant submission of the punitive damages award to the jury or, if it did, that the amount of the compensatory and punitive damages demonstrates passion and prejudice and thus Dillard's is entitled to a new trial or remittitur.

I. Judgment As A Matter Of Law

Dillard's asserts that plaintiff did not produce legally sufficient evidence to support her § 1981 claim, which required proof that (1) plaintiff was a member of a racial minority; (2) Dillard's had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or

more of the activities enumerated in the statute. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996). Dillard's contends that it is entitled to judgment as a matter of law because plaintiff failed to produce evidence on the second and third elements of her claim.

A. Benefit Of Contractual Relationship Under § 1981

Dillard's first asserts that a coupon for a free cologne sample is not a contract interest which is sufficient to warrant protection under 42 U.S.C. § 1981. That statute provides in part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" *Id.* § 1981(b). Dillard's asserts that as a matter of law the coupon for a free cologne sample was not a benefit of a contractual relationship.

Dillard's correctly points out that "the law of contracts is confined to promises that the law will *enforce*" and that "[c]ourts have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it." Defendant's Memorandum in Support at 4, citing E. Allan Farnsworth, *Contracts*, § 1.1, at 4 (1982) (emphasis in original). In this case the bargained-for exchange was plaintiff's money in return for Dillard's Easter outfit; the consideration was money and clothing. Dillard's

contends that § 1981 protects only the performance of the terms of a contract, and that because the free coupon was not part of the bargained-for exchange in this case, it was a gratuitous promise and was not enforceable.

Section 1981, however, as amended by the Civil Rights Act of 1991, specifically provides that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the *enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" *Id.* § 1981(b) (emphasis added). This language provides that once a contractual relationship exists, a benefit or privilege of that relationship may not be withheld based on the race of one party to the contract—even if the benefit or consideration was not the consideration for the contract. *Cf. Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir.1996) (allegation of interference with "prospective contractual relations" does not state claim under § 1981; plaintiffs failed to "allege actual loss of a contract interest."). Thus, although in this case the free sample was not part of the bargained-for exchange, it could be a privilege or benefit of the contractual relationship. The question then becomes whether plaintiff presented sufficient evidence that the coupon was a privilege or benefit of the contractual relationship.

Dillard's cites testimony by witnesses who suggested that coupons were indiscriminately doled out to customers who had not made purchases, and argues that such evidence demonstrates that the coupons were not a privilege or benefit of a purchase. Only one of these witnesses testified about the coupon promotion on the date in question, however, and she testified that the coupons were given both to those who made purchases and to some who did not. Dillard's asserts that plaintiff presented no evidence that would support an inference that the coupons were a privilege or benefit of a purchase. This argument is rebutted by the testimony of

plaintiff and Cooper, who both testified that although they were in the store for over an hour, they saw no one who was freely distributing fragrance coupons. Plaintiff and Cooper testified that neither one of them received a coupon until after plaintiff made a purchase.[2]

Plaintiff's argument is not discredited by the fact that Cooper received a coupon but bought nothing. Plaintiff's purchase was for Cooper's child, Cooper was part of plaintiff's shopping party, and the jury reasonably could have concluded that as a benefit of plaintiff's contractual relationship with Dillard's, plaintiff and her companion received coupons for free fragrance samples. Nor is plaintiff's argument discredited by the fact that other customers, of unidentified race and identity, received coupons without purchases. Whatever may have been the circumstance for other customers, the jury was entitled to find on this evidence that the fragrance coupons were a benefit of plaintiff's contractual relationship with Dillard's. Based on the evidence of record, the Court can not determine otherwise as a matter of law.

B. Intentional Interference With Contract Benefit

Dillard's asserts that as a matter of law, even if the coupon was a benefit of plaintiff's contractual relationship, Wilson did not intentionally interfere with her right to redeem the coupon. Dillard's points out that the Court sustained its

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[2] Plaintiff testified that her sales associate told her that she was entitled to a free gift because she had made a purchase. I Tr. Trans. at 122. Dillard's objected to this testimony as hearsay, and the Court instructed the jury that it could not be taken for the truth of the matter asserted. The statement, however, was admissible as non-hearsay because it was offered as an admission by a party-opponent under Fed.R.Evid. 801(d)(2)(D) (statement offered against a party that is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship").

summary judgment motion on plaintiff's claim of false imprisonment and that in doing so it held that Wilson did not hold plaintiff against her will; that even if he had restrained plaintiff's liberty, he had probable cause to detain her on suspicion of shoplifting; and that plaintiffs therefore failed to create a jury question on the false imprisonment claim. Dillard's argument incorrectly assumes that because Wilson's actions were privileged under state law, he could not have interfered with plaintiff's right to redeem her coupon for a free fragrance sample. The record will reflect that the trial was bifurcated and that the first phase of trial dealt only with factual questions whether the coupon was a benefit or privilege of the parties' contractual relationship and whether Wilson interfered with plaintiff's attempt to obtain that benefit or privilege. The Court has already addressed the first question. As to the second, plaintiff and Cooper both testified that plaintiff was in the process of redeeming her coupon when Wilson stopped Cooper, who was carrying the Dillard's bag which contained plaintiff's purchase. Betty Chouteau, the perfume consultant, also testified that plaintiff was redeeming the coupon when Wilson intervened.[3] Based on these circumstances, the jury could reasonably conclude that Wilson intended to interfere with plaintiff's redemption of the coupon. Thus plaintiff produced legally sufficient evidence that Wilson intentionally interfered with her redemption of the coupon.

C. Intentional Racial Discrimination

Dillard's asserts it is entitled to judgment as a matter of law on plaintiff's § 1981 claim because in granting Dillard's

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[3] Chouteau testified that she had given plaintiff the sample when Wilson interrupted their conversation, but she also testified that she was not certain whether plaintiff took the free sample or what she did with it if she took the sample. I Tr. Trans. 119.

summary judgment on the false imprisonment claim the Court found that Wilson had probable cause to stop plaintiff. Dillard's argues that even if Wilson interfered with plaintiff's contractual right by conducting an investigative stop, he had a legally sufficient excuse because he reasonably believed that Cooper was attempting to steal from Dillard's. Dillard's argues that this legal excuse is a legitimate nondiscriminatory reason for the stop. It then asserts that plaintiff can not show that the stop was a pretext because the Court ruled on summary judgment that Wilson had probable cause to stop her and that plaintiff had no direct evidence of discrimination.

Plaintiff could carry the burden to show that Dillard's discriminated on the basis of race "either directly by proving [defendant] acted with a discriminatory motive" or "indirectly by showing that [defendant]'s proffered reasons are pretextual."[4] *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir.1995) (further citations and quotations omitted). "In the final analysis, the [trier of fact] is required to weigh all the evidence and to assess the credibility of witnesses in order to determine whether the plaintiff was the victim of intentional discrimination based upon protected class characteristics." *EEOC v. Flasher*, 986 F.2d 1312, 1317 (10th Cir.1992). The ultimate determination of "whether there was intentional discrimination against a protected class is considered a question of fact." *Id.*

Dillard's asserts that plaintiff offered no evidence at trial to support a conclusion that Dillard's had any motivation to intentionally deprive her of the benefit of the free perfume sample due to her race. Dillard's fails to appreciate, however,

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[4] Defendant also asserts that the Court abused its discretion by allowing plaintiff to introduce evidence which attacked Wilson's credibility after it held, on summary judgment, that his deposition testimony was credible. The credibility of a witness is always an issue at trial, however, even if summary judgment was based in part on a finding that the witness was credible. *See* Fed.R.Evid. 608.

that discriminatory animus may be inferred from the simple showing of pretext. As the Tenth Circuit noted:

> [A] showing of pretext is evidence which allows a jury to infer discriminatory intent. Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury. This conclusion flows directly from the Supreme Court's analysis in *St. Mary's Honor Ctr. [v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)*]*, where the Court observed that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, 509 U.S. at 510-11, 113 S.Ct. at 2749. The Supreme Court had issued a similar ruling earlier in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) when it said that a plaintiff may satisfy her "ultimate burden of persuading the court that she has been a victim of intentional discrimination . . . by showing that an employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095.

Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995) (footnote omitted) ("if this inferential evidence is sufficient to allow a plaintiff to prevail at trial, it is surely sufficient to permit a plaintiff to avoid summary judgment so that the plaintiff can get to trial."). In this case, after a full trial on the merits the burden-shifting *McDonnell Douglas* analysis has dropped out, leaving the "single overarching issue whether plaintiff adduced sufficient evidence" to warrant the jury's determination that Wilson intentionally discriminated against plaintiff on the basis of her race. *See Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 744 (10th Cir.1991).

Dillard's asserts that the Court conclusively determined at summary judgment that Wilson had probable cause to detain

plaintiffs, and contends that the Court erred in refusing to instruct the jury that it had so ruled. *See* Fed.R.Civ.P. 56(d) ("court should make an order specifying the facts that appear without substantial controversy"; and "[u]pon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."). The Court granted summary judgment on plaintiff's false imprisonment claims because on the summary judgment record it found that Dillard's had produced unrefuted evidence that Wilson had probable cause to stop plaintiff. *See Hampton*, 985 F.Supp. at 1061. The Court stated as follows:

> In this case . . . plaintiffs fail to identify material questions of fact which prevent summary judgment on the issue of probable cause.
>
> While plaintiffs argue that a jury issue exists as to Wilson's credibility, they cite no evidence which seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room. In the circumstances, plaintiff's evidence, taken together, is insufficient to establish a reasonable inference that Wilson's testimony is unworthy of belief.

Id.

Although Dillard's correctly notes that Rule 56(d) "empowers a court to specify (and set to one side) facts that are without substantial controversy, the rule nevertheless 'permits the court to retain full power to make one complete adjudication on all aspects of the case when the proper time arrives.'" *Colasanto v. Life Ins. Co. of N. Am.*, 100 F.3d 203, 210 (1st Cir.1996) (quoting 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2737 (2d ed.1983)). "An order granting a judgment on certain issues is a judgment on those issues. It forecloses further dispute on those issues at the trial stage. An order denying a motion for partial summary judgment, on

the other hand, is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought. It does not settle or even tentatively decide anything about the merits of the claim." *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir.1986) (further quotation omitted). In the instant case the Court did not grant Dillard's summary judgment motion on plaintiff's § 1981 claim, and the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim.

Dillard's argument also is based upon the faulty premise that if Wilson had probable cause to stop plaintiff, that probable cause could not be a pretext for discrimination. *See, e.g., Tanner v. Heise*, 879 F.2d 572, 580 n. 5 (9th Cir.1989) ("mere compliance" with state law did not shield police from liability if plaintiff could prove officers were motivated to arrest him as harassment for religious beliefs); *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir.1989) (viable equal protection claim where officer humiliated plaintiff on basis of race during lawful arrest). It ignores the fact that probable cause may clearly be a pretext for discrimination when security officers detain only *minority* shoplifting suspects while letting their majority counterparts tend freely to shoplifting business. It further ignores the fact that probable cause, which implicates an objective inquiry, and lack of discriminatory intent, which is an inherently subjective topic of inquiry, are not fungible concepts. Probable cause does not mean lack of discriminatory intent any more than lack of probable cause means racially-based animus.

Dillard's also argues that plaintiff produced no direct evidence of discrimination. Dillard's notes that Wilson used no racial epithets during the incident. Although such evidence may support a finding of discriminatory intent, it is not required. *Cf. DeNovellis v. Shalala*, 124 F.3d 298, 301 (1st Cir.1997) (Title VII discrimination may involve racial

slurs or other types of racially motivated harassment). Dillards also contends that plaintiff produced no evidence that it instructed Wilson to target African-American shoppers or that Wilson was racist in his treatment of shoppers or in his work as a Kansas Highway Patrolman.

Dillard's argument misses the mark. In *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir.1978), plaintiff sued a bank and several state officials, alleging that pursuant to a racially inspired policy of photographing "suspicious" black men and women, defendants photographed him when he entered the bank. The Third Circuit found that the plaintiff's § 1981 claim survived a motion to dismiss for these reasons:

> Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers "as is enjoyed by white citizens." Here, plaintiff asserts that upon entering the premises to transact business, his photograph was taken for the police by bank employees pursuant to a racially based surveillance scheme. He received disparate, and because it was based on race, disparaging treatment for which the record offers no justification.
>
> This was not the isolated act of an individual employee, but rather the implementation of a policy deliberately adopted by the bank management to offer its services under different terms dependent on race.

Hall, 570 F.2d at 92.

"The issue of intent . . . is one that is often not susceptible to direct proof, and a court should consider all conflicting inferences that may be presented by the circumstantial evidence in the case." *Washington v. Duty Free Shoppers, Ltd.*, 710 F.Supp. 1288, 1289 (N.D.Ca.1988), citing *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). A plaintiff may present a variety of types of evidence

to establish that defendant's stated reasons for its actions were pretextual. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Statistical data showing defendant's pattern of conduct toward a protected class can support an inference that defendant discriminated against individual members of the class. *See Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir.1991) (employer's pattern of conduct can create inference that employer discriminated against plaintiff); *cf. Lewis v. J.C. Penney Co.*, 948 F.Supp. 367, 372 (D.Del.1996) (black woman who alleged § 1982 violation based on claim she was falsely accused of shoplifting did not allege or produce facts suggesting store had discriminatory policy; also did not allege interference with contract).

Plaintiff presented evidence that Dillard's employees routinely targeted and investigated African-Americans as shoplifting suspects. Two former Dillard's security officers, Michael R. Imber and David Cole, testified that they resigned from Dillard's, in part, because of its discriminatory practices. *See* II Tr. Trans. 208, 239-40. Further, though security officers told management that they were concerned about racial discrimination by Dillard's, Dillard's took no action to address these concerns. *See* II Tr. Trans. 245, 262. Plaintiff also presented testimony that through race codes, Dillard's targeted black customers (but not white customers) when they entered the store. II Tr. Trans. 211, 239-40, 259-60. Imber also testified that from 1991 through 1994, when he was a field supervisor for the Overland Park Police Department, he was instructed to oversee officers dispatched to a Dillard's shoplifting arrest because of the police department's concern about "bad arrests" at Dillard's. II Tr. Trans. 213-15. Imber also testified to his opinion, based on his experience after April, 1994, that Dillard's "preyed on" and targeted African-American shoppers. *Id.* Plaintiff also presented testimony that store incident reports identified shoppers by race and by no other characteristics, and that in

contrast to their white counterparts, African-American shoppers were written up for "suspicious" activity such as returning merchandise without a receipt.

Plaintiff presented evidence that Wilson placed her under surveillance shortly after she entered the store. Wilson's incident report reflected the practice of using racial identifiers for those who engaged in suspicious activities.[5] The record therefore contained evidence that Wilson targeted plaintiff and her niece at least in part because of this discriminatory practice, and that in so doing Wilson interfered with plaintiff's enjoyment of a benefit of her contractual relationship with Dillard's in violation of § 1981. The Court therefore overrules Dillard's motion for judgment as a matter of law.

II. Motion for New Trial

As an alternative to its motion for judgment as a matter of law, Dillard's moves for a new trial or remittitur.

A. Bifurcation

One day before trial, the Court decided sua sponte to bifurcate the trial. Although Dillard's did not object, it now asserts that bifurcation was prejudicial.[6] "The court, in

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[5] The "Dillard's Security Report" which Wilson completed included a space for the race of each subject. The narrative part began with Wilson's statement that he was "watching two black females with two kids and a stroller." It explained that "[t]he black female that had on a dark leather coat [had a pair of pants]" and that "[t]he other black female left the area with the children." Wilson used the term "black female" twelve times in the 1 1/2 page hand-written report. Plaintiff's Trial Ex 5.

[6] *See Defendant's Reply To Plaintiff's Memorandum in Opposition To Motion For Judgment As A Matter Of Law, Or Alternatively For New Trial Or Remittitur*, Exhibit A, Transcript of Telephone Conference, Dec. 3, 1997 11; 12-14. Dillard's did state that it would object to "any argumentative voir dire on race as potentially tainting the jury on these simple issues." *Id.* at 20.

furtherance of convenience or to avoid prejudice, or when separate trials will be conductive to expedition and economy, may order a separate trial of any claim, . . . or of any separate issue." Fed.R.Civ.P. 42(b). "Only one of these criteria need be met to justify bifurcation," and "Rule 42(b) places the decision to bifurcate within the discretion of the district court. The rule clearly suggests that a court may bifurcate a trial on its own motion. A decision ordering bifurcation is dependent on the facts and circumstances of each case." *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir.1996) (internal citations and quotations omitted).

In this case, it was clear before trial that the issue of race discrimination was entirely severable from the narrow and technical issues whether the fragrance coupon was a benefit or privilege of the contractual relationship and whether Wilson intentionally interfered with plaintiff's exercise of that privilege. Negative findings on these narrow threshold questions could have rendered moot the remaining evidence of discrimination—which constituted the vast majority of the evidence to be presented at trial. Dillard's now asserts, however, that the issues were not clearly separable and that by dividing the issues of "intentional interference" and "discrimination," the Court lowered plaintiff's burden of proof. The second phase of the trial, however, required the jury to find that Dillard's intentionally discriminated against plaintiff because of her race. The circumstances met the Rule 42 need for economy, and thus bifurcation was not an abuse of discretion.

Dillard's also argues that several prejudicial aspects of bifurcation entitle it to a new trial. First, Dillard's states that after empaneling the jury, the Court told the jurors that this was an important race discrimination case with a lot at stake, and suggested that the first phase of the trial was only a stepping stone to be endured before getting to the heart of the

case.[7] This argument mischaracterizes the Court's comments. In introducing the case, the Court stated that "[t]his is a race discrimination case." I Tr. Trans. at 13. After briefly summarizing the parties' theories, it described the expected length of trial, stated that "[t]his is an important case to the parties," and added that "the lawyers and their clients have a lot at stake." *Id.* at 14. This introduction to the case was not "highly prejudicial and misleading," and it did not encourage the jury to find for plaintiff in phase one out of a sense that it would be only fair to hear the entire case.

Dillard's also complains that in the first phase of trial, when plaintiff's counsel made a comment about a "wrongful stop," the Court refused to instruct the jury that as a matter of law, Wilson had probable cause to detain plaintiff. The Court did instruct the jury that "the officer's motivation for stopping the plaintiff and her party has nothing to do with what you're going to decide at this part of the trial, so you can ignore everything concerning his motives and why he might have stopped them." *Id.* at 181. The jury instructions in the first phase clearly instructed the jury to consider the narrow

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[7] This comment was part of the stock preliminary instructions which the Court gives as it introduces the voir dire process at beginning of each trial. As in other cases, the Court told the jury that the case had been on file for a long time, that the case was an important one to both the parties and the attorneys, who both had a lot at stake, and that they were entitled to a fair jury to decide the issues of fact presented. *See* I Tr. Trans. at 14.

Dillard's also states that on a radio talk show on December 28, 1997, the jury foreperson stated that the Court led the jury to believe the case should have been settled. The Court did not hear that broadcast, and it is not aware that it made any statements before or after trial which communicated any such opinion to the jury. Certainly the Court's comments during voir dire suggest nothing about the Court's views on settlement. If the jury foreperson based her alleged comment on statements which are not contained on the record, the comments had to have been made to the jury after it had returned its verdict. The Court did not discuss the case with any juror, except as reflected on the record, prior to that time.

questions before it. Absent evidence to the contrary, the Court assumes that the jurors followed the instructions. *See Shamrock Drilling Fluids, Inc. v. Miller*, 32 F.3d 455, 460 (10th Cir.1994).

B. Evidentiary Rulings

Dillard's next asserts that the Court erred in admitting certain evidence and excluding other evidence. Under Federal Rule of Evidence 401, "relevant evidence is that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir.1995) (quoting Fed.R.Evid. 401.) "The Rule's basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *Gomez*, 50 F.3d at 1518.

Dillard's contends that it is entitled to a new trial because "the bulk of the evidence produced by plaintiff at trial was unrelated to Officer Wilson, plaintiff, or the time period when the alleged intentional discrimination took place." *Memorandum In Support Of Defendant's Motion* at 16. This is a sweeping argument, one which is difficult to analyze because Dillard's motion largely fails to cite the relevant trial record on this issue. Based on Dillard's pre-trial and post-trial motions, however, along with the trial record, the Court will address the claims of evidentiary errors with as much specificity as possible.

Before trial, Dillard's filed a motion in limine to exclude "all speculative or conclusory testimony and evidence alleging without factual foundation that defendant is racist as

well as other irrelevant testimo[illegible]" Doc. # 81. Dillard's asserted that plaintiff should [illegible]pine that it had racist practices because such testimony lacked the factual foundation required by Rule 701 for lay opinion testimony. Dillard's further argued that lay opinion evidence of alleged racism should be excluded because it was not relevant and even if relevant, that its probative value did not outweigh its prejudicial effect. *See* Fed.R.Evid. 401, 402, 403.

Lay opinion testimony is admissible when it is "(a) rationally based on the perception of the witness," and (b) "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed.R.Evid. 701. The fact that lay opinion bears on an ultimate issue in the case does not render it inadmissible. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir.1997).

At a hearing on the motion, the Court first ruled that under Fed.R.Evid. 701, lay witnesses could testify concerning an opinion that a Dillard's employee treated them in a racist manner if the opinion was based on personal experience. Doc. # 149 at 27-28. The Court expressed concern, however, about putting time limits on this sort of "anecdotal evidence." *Id.* at 28. In response, plaintiff asserted that for at least nine years before her incident, security guards and employees at Dillard's focused upon African-Americans in a discriminatory manner, that such practices had been passed on to new employees as part of their on-the-job training, and that such evidence was relevant because it proved a continuing policy and practice. *Id.* at 29; 37. The Court stated:

> [i]t seems to me there [are] two issues. One is, did Dillard's have a pattern and practice, and, number two, if they did, were Wilson and Pam Fitzgerel implementing that pattern and practice when they had an encounter with these plaintiffs. Because even if they had a pattern and practice, if these people weren't following the

> pattern, that doesn't get you anywhere. They have to have an intent to discriminate.
>
> And so what is it about the facts of this case that links these two individuals with this so-called practice and pattern?

Id. at 34.

In a lengthy colloquy, plaintiff responded that she could tie Wilson's actions [8] to the alleged pattern and practice because he had received on-the-job training during his employment. *Id.* at 36. The Court acknowledged that Wilson's own training would be relevant but questioned the relevancy of evidence regarding the training of guards who had no connection with plaintiff. *Id.* at 37.

Plaintiff pointed to the practice of calling security codes when African-American customers entered the store, watching them, following them, and stopping them more often than white customers. The Court responded "[w]hat you're talking about is pattern and practice evidence. Again, we're talking about two separate things. But . . . we are not going to have a parade of people through who are going to say that I went to Dillard's and I wasn't treated right as a customer or I was wrongfully arrested." *Id.* at 43. After further discussion, the Court stated that

> [I]t's not material whether Dillard's had a pattern and practice unless you can show Wilson and Pam Fitzgerel were acting pursuant to that when they had their encounters with plaintiffs in this case. And so I think it's a reasonable limitation to restrict the scope of the

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[8] Plaintiff noted that while Wilson claimed that his attention had been drawn to plaintiff because of her nephew's baby stroller and because Cooper looked suspicious, plaintiff contended that in fact Wilson's attention was drawn to them because of the long-standing pattern and practice of super-surveillance of African-Americans. Plaintiff pointed out that Wilson's credibility would be crucial on this issue.

> evidence to events which occurred . . . on or after the time that Wilson started working there. That would be as to 404(b) acts of discrimination.
>
> If you want to put in evidence about training or lack of training, you know, specific policies, I am not meaning to tie your hands on that at all. But that would be my ruling on the defendant's motion in limine. And if you can lay a foundation for evidence beyond that at trial, then you need to approach the bench and we'll hash that out outside the jury's hearing.

Id. at 52.

Dillard's asserts that the Court abused its discretion in allowing opinion testimony about alleged discrimination as far back as the late 1980's, while not allowing evidence of specific discriminatory acts. The Court's ruling allowed for plaintiff to establish a foundation for Rule 701 lay opinion testimony while limiting the potential for prejudice under Rule 404(b). For example, a guard who testified that he worked at Dillard's for years has shown enough personal knowledge to rationally testify that based on his observations, African-Americans were targeted for more surveillance than whites. Further, the Court did allow evidence of specific incidents involving targeting of African-Americans, even before Wilson was employed. These incidents were relevant to show a pattern and practice where plaintiff produced evidence of the continuity of management from the time of that incident to the time Wilson was trained. The Court balanced the need for a foundation for lay opinion testimony with the need to exclude evidence of prior acts under 404(b) [9]

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[9] Under Rule 404(b): "(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed.R.Evid. 105, upon request, the trial court shall instruct the jury that the evidence of similar acts is to be considered only for the

unless offered for a proper purpose. To the extent that witnesses were allowed to testify under Rule 701, the Court allowed enough testimony to establish a foundation for the lay opinions. Further, a review of the trial transcript indicates that most of the testimony to which Dillard's objected was properly admitted.[10] This evidence included:

1. Michael Imber's testimony that he quit his security job at Dillard's because he "didn't like the way that Dillard's, some of the associates and security personnel treated black customers." II Tr. Trans. 208. The Court admitted this evidence under Rule 701, finding that it would be relevant and helpful to the jury. The Court allowed Imber to testify that he spoke to management about his concerns. *Id.* at 208-209. This evidence was relevant to the training issue, and it demonstrated that management knew about potential race discrimination. On cross-examination, Imber admitted that "generally speaking" he did not think Dillard's is discriminatory. *Id.* at 219-220. On further cross-xamination, Imber testified that he resigned before Wilson began working for Dillard's, *id.* at 216, and that he had never heard any complaints about how Wilson treated African-Americans.

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proper purpose for which it was admitted." *United States v. Meacham*, 115 F.3d 1488, 1494 (10th Cir.1997) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). In this case, evidence of prior incidents of targeting African-Americans was relevant to show motive, intent, and knowledge of Dillard's. The probative value of this evidence was not substantially outweighed by its potential for unfair prejudice, and Dillard's did not request a limiting instruction. Evidence of the incidents of targeting African-Americans was also admissible under Fed.R.Evid. 406 to show the routine practice of Dillard's.

[10] In its motion for judgment as a matter of law, Dillard's does not predicate its claim of error on "general testimony" or "prior incidents" which are specifically identified in the trial record.

2. Testimony by David Cole, who worked as a security guard for Dillard's in 1990 and 1991. Cole testified he quit his job, in part because sales associates routinely reported black customers coming into the store and asked him to follow them for no reason. *Id.* at 239. The Court allowed this testimony as relevant to the policy and practice of Dillard's. *Id.* at 238.

3. Testimony by Darrold Conrad, who was employed as a security guard at Dillard's from 1986 through early 1992. *Id.* at 243. Conrad testified that he reported to Dillard's management, including Rodgers and operations manager Marva ("Marvie") Dirks, that he was sometimes called to investigate matters concerning minority customers who in his opinion had been stereotyped as shoplifters. *Id.* at 244-45. This testimony was relevant to show the knowledge of Dillard's management.

4. Testimony by Gregory Powell, a Dillard's security guard who worked from 1987 to 1994. Powell testified that on many occasions African-Americans were closely watched while white customers were allowed to freely engage in similar behavior. *Id.* at 261. He told Dirks that training in this area would be helpful. Again, this testimony was relevant to the knowledge of Dillard's management and to the lack of training.

5. Testimony by Byron Pierce, a security officer with Dillard's from 1990 to 1992 and again in 1997. Pierce testified that he has been called to investigate African-American customers more frequently than white customers. III Tr. 468. He also testified that in mid-to-late 1997, he was working plain clothes security and received a call reporting that a black man was walking around the store. It soon dawned on him that he was the subject of the report, even though he had done nothing suspicious. *Id.* at 469. Pierce also testified about an incident in which a Dillard's security officer without probable cause took clothing from an African-

American shopper who had gone to her car, and told her she could not have it back unless she produced a receipt. *Id.* at 474. This testimony related for the most part to the time period during which Wilson worked, and was relevant to the pattern and practice of Dillard's in targeting African-American shoppers.

6. Testimony from Sondra Samuels that when she was shopping at Dillard's in the fall of 1997, she was followed throughout the entire time she shopped. *Id.* 483. She was dressed in a business suit and she was not carrying any bags, but Samuels testified that she believed she was followed because she was black. *Id.* at 485. She also testified that when she called management about the incident she received no apology. *Id.* at 489. This testimony was relevant to show the knowledge of Dillard's management concerning the security practices at the time Wilson was employed at Dillard's.

For the most part, plaintiff tied the challenged testimony of such witnesses to recent policy and practice at Dillard's and/or management's knowledge of discrimination and failure to train security guards and other employees on this issue.[11] *Cf. Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1186 (5th Cir.) (without testimony of circumstances, or "without examples of blacks who were scrutinized while similarly-situated whites were not," conclusory statements that blacks were closely "watched" in employment setting

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[11] The testimony of Geraldine Jones is another area of possible dispute. Jones testified that she worked as a security guard at Dillard's from 1987 to 1990, under store manager Jack Rodgers. *Id.* 229. Rodgers was still manager at the time relevant to this case, and plaintiff tried to question Jones about whether she had ever discussed with Marvie Dirks, the operations manager at the Oak Park store, how Dillard's treated African-American customers. The Court sustained Dillard's objection as to relevancy, however, and there is no basis for error in Jones' testimony. The Court does not discuss it further. *Id.* at 231.

were incompetent to establish pattern of discrimination), *cert. denied*, — U.S. —, 118 S.Ct. 366, 139 L.Ed.2d 284 (1997). Cole's testimony, however, concerned events well beyond the two-year limit the Court originally set for specific incidents, and it was perhaps not closely tied to current policy and practice or management knowledge. Given all of the testimony which was properly admitted in this case, however, it could not have affected the substantial rights of Dillard's. Further, the record reflects that even if the Court erred in excluding evidence of some specific acts while allowing general conclusions based on those acts, Dillard's was allowed to effectively cross-examine these witnesses about their conclusions and the grounds for them.

The Court next addresses Dillard's assertion that the Court abused its discretion because it admitted without sufficient foundation lay testimony that Wilson was racist. Specifically, Cooper testified that she believed Wilson's acts were racist because he was "snotty." II Tr. Trans. 302. Plaintiff also testified that she believed Wilson had stopped her because she was black, based on her observation that he appeared angry, was "red in the face," and "his whole attitude was how dare you question me this way." II Tr. Trans. 325. These observations may be compatible with a race-based animus, but there is little foundation for these two witnesses' testimony that Wilson harbored racial animus toward them. *Cf. Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 347 (1st Cir.1995) (witnesses' inferred racial animus based on personal observations that person was "unfriendly" acted "angrily," etc.; although observations compatible with race-based animus, no foundation for such an inference). Although the credibility of the opinion testimony and the weight to be given it are questions for the jury, *see Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616 (10th Cir.1984), the Court perhaps erred admitting this lay opinion evidence. By itself, however, the erroneous receipt of such evidence does

not entitle Dillard's to a new trial. Dillard's cross-examined both witnesses extensively on this testimony and whether they had a rational basis for their opinions. Given the abundant independent evidence regarding Dillard's treatment of minority shoppers, the Court is certain that the self-serving testimony of plaintiff and Cooper on this issue had no material effect on the jury.

Dillard's also attacks admission of evidence that it characterizes as "rumor" regarding the scheduling of security officers. This evidence dealt with the fact that according to Imber and Powell, Dillard's started to schedule work shifts for security officers based in part on how many people they apprehended. This change was a factor in Imber's decision to quit, and plaintiff asserts that it was admissible as an exception to the hearsay rule. *See* Fed.R.Evid. 803(1). In any event, operations manager Dirks testified that she compiles her schedule for security officers based in part upon their effectiveness as officers, including the number of apprehensions. This evidence was admissible and in any event could not have affected the substantial rights of Dillard's.

Dillard's next asserts that the Court improperly allowed plaintiff to impeach Wilson with evidence of incidents of untruthfulness, one of which occurred over 20 years ago. Under Fed.R.Evid. 608, specific instances of past misconduct that is probative of a witnesses' character for truthfulness may be the subject of inquiry on cross-examination, although it may not be proved by extrinsic evidence. The rule gives the Court discretion and does not include a recency requirement. Although the recency is certainly a factor which the jury may consider, the Court did not abuse its discretion in allowing plaintiff to inquire of Wilson about an incident in which he was suspended for filing an erroneous leave report. Evidence of an allegation of an incident in 1995 for which

Wilson was ultimately cleared was also not erroneously admitted. The jury heard Wilson's explanation and could give it appropriate weight.

Dillard's next asserts that the Court erred in admitting statistical evidence of the race of persons involved in arrests and other incidents. Several witnesses, including Dirks and other Dillard's employees, testified concerning the incident log which included racial codes from which plaintiff gleaned damning statistical evidence. Dillard's asserts that the statistical evidence was more unfairly prejudicial than probative, and argues that this evidence had no relevance to the question whether Wilson intentionally discriminated against plaintiff by interfering with her ability to redeem her free fragrance coupon. Dillard's also contends that the Court erred in admitting the Security Incident Log, Ex. 3, the History of Arrests Document, Ex. 6, and the Compilation of Data from History of Arrests, Ex. 7, because these exhibits were prejudicial and misleading.[12] The Court disagrees. This

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[12] Ironically, plaintiff had originally intended to offer only summaries of these exhibits to demonstrate that African-American shoppers were stopped at a rate that was disproportionate to their representation in the pool of shoppers at the Dillard's store in the Oak Park Mall. Defendant strenuously objected to this statistical method of proof, and to make her point, plaintiff was forced to prepare a large demonstrative exhibit in the courtroom, plodding through each exhibit and tallying the reported racial composition of the suspicious shoppers at defendant's store. This water-torture method of proof, which consumed many hours, actually redounded to plaintiff's benefit because the jury thereby learned much more than the sterile statistical information which was the purpose of plaintiff's exercise. For one thing, the jury learned the astoundingly innocuous nature of conduct which Dillard's viewed as "suspicious" when committed by minority shoppers—whether black, hispanic, or otherwise. For example, the entries on the log included "two black females in dresses [department]," II Tr. Trans. at 360; "four black males and one black female made purchase and left without incident," *id.* at 365; "two groups of black females in better dresses [department]," III Tr. Trans. 394; and "two black females walking around with a list of some kind." *Id.* at 401.

evidence was indirect evidence that Dillard's had a corporate policy which targeted African-American and other minority shoppers for security purposes.

Dillard's next argues that the Court erred in refusing to admit plaintiff's exhibit 15, a statement which plaintiff gave about the incident on April 5, 1996. Dillard's offered this exhibit as an admission against interest, Fed.R.Evid. 801(d)(2), to show that in her initial statement plaintiff did not allege that the incident was racially motivated. Even if it [sic] the Court erred in excluding this statement, plaintiff admitted on cross-examination that she did not initially tell the store manager that she believed the incident was racially motivated; thus Dillard's was not prejudiced by any error.

Dillard's next contends that the Court erred in allowing plaintiff's counsel to read from Chouteau's statement in cross-examining Dirks. Dillards alleges that this allowed plaintiff to use hearsay testimony without Dillard's being able to cross-examine Chouteau. Plaintiff points out that Dillard's had made much of the fact that on the day of the incident, plaintiff did not claim that it was racially motivated. Dirks had testified that she had read the reports, including Chouteau's report, and that she found in them no claim of race discrimination. Thus, it was proper for plaintiff to use the statement to cross-examine Dirks.

Finally, Dillard's asserts that the Court erred in allowing plaintiff to offer rebuttal testimony that Daryl Hayes, a Dillard's employee, used the "'N' word" while working for Oak Park Mall Security in the early 1990's. Plaintiff contends such testimony was proper rebuttal evidence under Fed.R.Evid. 613(b) because Hayes had denied ever using the word and Dillard's could have recalled him as a witness. Plaintiff points out that Fed.R.Evid. 608(b) does not preclude rebuttal evidence if offered to show that a statement made on direct examination is false, even if that statement is

collateral. *See United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir.1994). Dillard's counters that it was not rebuttal evidence because it merely contradicted evidence raised by plaintiff on cross-examination. The Court first notes that according to plaintiff's proffer, the tendered testimony was that Hayes used this word *while working for Dillard's*. This proffer turned out to be in error. Though the Court recognizes that this testimony raised a potential for prejudice, evidence that Dillard's employees demonstrated racial animus was relevant to the case. Further, any error in admitting this evidence as rebuttal evidence is not a basis for a new trial.

Dillard's has failed to show that evidentiary errors entitle it to a new trial.

C. Jury Instructions

Dillard's asserts that jury instructions 10 and 17 were contradictory and misleading. Instruction 10 was given after the first phase of the trial, and provided in part that plaintiff

> claims [Dillard's] violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's, on account of her race. More specifically, plaintiff contends that [Dillard's] intentionally prevented her from redeeming a free cologne sample which Dillard's had given her as a benefit of a purchase in its children's department.

Doc. # 139. Instruction 17 was given after the second phase of the case, and stated that plaintiff

> claims that [Dillard's] violated her civil rights under 42 U.S.C. § 1981 by intentionally denying her the right to enjoy all benefits and privileges of her contractual relationship with Dillard's on account of her race. More specifically, plaintiff contends that Dillard's surveillance, detention and search of her belongings constituted

> a security practice which unequally burdened her as an African-American shopper.

Doc. # 142. Dillard's correctly points out that this last sentence quoted from Instruction 17 suggests an implied contract claim, and that claim was disposed of on summary judgment. But Instruction 17 set forth nothing more than plaintiff's claim. Instruction 18 specifically set out the elements of plaintiff's § 1981 claim at trial. Further, although Dillard's suggests otherwise, Instruction 18 states that in order to prove that her race was a motivating factor in Dillard's conduct, plaintiff had the burden of proving that "but for its unlawful motive, defendant would not have denied plaintiff the right to enjoy the benefits and privileges of her purchase." Taken as a whole, these and the other instructions provided a correct statement of the law and provided the jury an ample understanding of the issues and applicable legal standards. *See Allen v. Minnstar*, 97 F.3d 1365, 1368 (10th Cir.1996).

D. Sufficiency of the Evidence

Dillard's argues that it is entitled to a new trial because the jury verdict with respect to liability, compensatory damages and punitive damages was contrary to the clear weight of authority. A new trial is not warranted unless the verdict was "clearly, decidedly, or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir.1984).

The Court emphatically rejects Dillard' [sic] argument that the evidence in this case was not sufficient to support the verdict. Plaintiff was an extremely credible witness. Some of Dillard's witnesses, including Wilson in particular and to a lesser extent Dirks, were not similarly credible. Because the weight of the evidence was in plaintiff's favor, the reasons detailed by the Court in denying Dillard's motion for judgment as a matter of law apply here and clearly support the jury's verdict.

III. Judgment As A Matter Of Law on Punitive Damages

Dillard's next argues that it is entitled to judgment as a matter of law because the evidence was insufficient to submit plaintiff's punitive damages claim to the jury. Punitive damages may be imposed in civil rights cases only if the discrimination was "'malicious, willful, and in gross disregard of [plaintiff's] rights.'" *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir.1995) (quoting *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir.1989)) (further quotations and citations omitted.).

Dillard's first asserts that in determining whether to award punitive damages the jury could properly consider only Wilson's conduct on this occasion, and not the prior incidents of alleged discrimination by Dillard's employees. Dillards [sic] points out that Wilson stopped plaintiff for less than five minutes and used no racial epithets. Further, although the jury did not learn of this finding, Dillard's notes that the Court found that Wilson had probable cause to stop plaintiff and search the shopping bag. Dillard's argues that if Wilson had a legal right to stop plaintiff, such a finding is inconsistent with a finding of malice or gross disregard. The Court has already ruled that it properly kept from the jury its ruling on probable cause. Once the case went to the jury, the whole issue of Wilson's credibility was before it. The Court has observed that Wilson was not a credible witness, and the jury obviously agreed.[13]

Dillard's also asserts that plaintiff's theory was based solely on the alleged actions of Wilson, and that liability could be imputed to Dillard's only under the doctrine of

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[13] The jury's assessment of Wilson's credibility was manifest in its verdict in phase one of the trial—before the jury heard any of the allegedly inflammatory evidence regarding racially-based treatment of minority shoppers. If the jury did not believe Wilson's testimony regarding where he detained plaintiff, it is no surprise that it rejected his testimony on the highly consequential subject of discriminatory intent.

respondeat superior. Dillard's cites *Fitzgerald* for the assertion that in order to hold Dillard's liable for punitive damages based on the actions of one of its employees, the agent must have the authority to "exercise control, discretion and independent judgment over a certain area of [the] business with some power to set policy for the company." *Fitzgerald*, 68 F.3d at 1263. In *Fitzgerald*, the Tenth Circuit noted that any intentional discriminatory conduct occurred "at the hands of [defendant's employee], not [the corporate defendant]," and then found that the employee had no managerial authority necessary to impute liability to the corporation. *See id.* at 1263-64 (although employee had some authority over employment decisions, she had insufficient power or control over an area of the business and no power to set company policy). In this case, Wilson did not have the authority to set policy. But here, contrary to Dillard's assertions, there was ample evidence that the act of selectively targeting Africa-Americans was authorized by Dirks and Rodgers, as managerial agents for Dillard's. In *Fitzgerald*, plaintiff did not "adequately present[ ] a theory of independent liability" against the corporation on the inadequacy of their investigation. Here, plaintiff presented substantial evidence that Dillard's knew about and ratified a policy of targeting African-Americans, and that Wilson carried out that policy.

IV. New Trial or Remittitur on Damages

Dillard's argues that the amount of the total damage award demonstrates passion or prejudice, and that a new trial is required. Plainly excessive damages may support an inference that passion or prejudice contributed to the jury's award. *Fitzgerald*, 68 F.3d 1257, 1262. But "absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the

jury's determination of the damages is considered inviolate." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir.1981) (en banc).

A. Compensatory Damages

Dillard's asserts that a compensatory damage award of $56,000 is excessive. The Court agrees with Dillard's assertion that because the value of the free cologne sample was negligible, the compensatory award must be premised in large part on plaintiff's evidence of emotional injury. But the Court rejects Dillard's further assertion that plaintiff's testimony about her mental suffering was insufficient as a matter of law to justify the compensatory damages award. In *Patterson v. P.H.P Healthcare Corp.*, 90 F.3d 927, 939 (5th Cir.1996), the Fifth Circuit found that a $40,000 award for emotional distress was not sufficiently supported by plaintiff's testimony that he felt "frustrated," "real bad," "hurt," and "angry." The Fifth Circuit holding was based on the fact that plaintiff did not present evidence with specificity and the record contained no evidence that he suffered from "sleeplessness, anxiety or depression." In contrast, in this case plaintiff gave eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children, that she was too emotionally distraught to drive, and that she had to call her husband for a ride home. II Tr. Trans. 326-27. Immediately after the incident she was crying and she was so upset that she could not write out a customer comment card, and a Dillard's employee filled it out for her. *Id.* at 337. She testified that "I don't feel that my life will ever be the same." *Id.* at 328. The jury was entitled to credit this testimony and to compensate plaintiff accordingly.

As noted in *Patterson*, "the harm is subjective and evaluation of it depends considerably on the demeanor of witnesses." In this case, plaintiff's testimony and demeanor left the Court with a firm conviction that plaintiff suffered genuine injury which vastly transcended the apparently trivial

value of any free fragrance sample and the more substantial insult of Dillard's refusal to apologize. Plaintiff's testimony was eminently credible. Having observed the witnesses and heard the evidence, the Court can not say that the actual damage award was based on improper passion and prejudice.

B. New Trial on Punitive Damages

Dillard's also asserts that the punitive damage award was excessive and requires a new trial. In so arguing, Dillard's again raises the same evidentiary and jury instruction issues raised before. The Court has found, however, that any trial errors did not affect the substantial rights of the parties. Thus they do not require reversal of the punitive damages award. Further, the alleged fact that the foreperson approached plaintiff after the verdict and kissed her on the forehead is not evidence of passion and prejudice.

C. Constitutionality of Punitive Damages Award

Relying on *BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), Dillard's asserts that the punitive damages award of $1,100,000 violated the due process clause of the United States Constitution. In *Gore*, the Supreme Court struck down a punitive damages award of $2,000,000 where plaintiff's purely economic injuries were $4,000. The Supreme Court found that the punitive damages award, which had been reduced from $4,000,000 on appeal to the Alabama Supreme Court, violated the Fourteenth Amendment substantive due process clause. In this case, in federal court, Dillard's claim is a Fifth Amendment substantive due process challenge. The Court need not address how the fact that this is a Fifth Amendment rather than a Fourteenth Amendment claim might affect the analysis,[14] because this case is distinguishable from *Gore* on many fronts.

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[14] Federal courts have suggested that the Fifth Amendment due process protection would apply "equally to the review of punitive damages

In *Continental Trend Resources v. OXY, Inc.*, 101 F.3d 634 (10th Cir.1996), on remand in light of *Gore*, the Tenth Circuit reduced from $30,000,000 to $6,000,000 a punitive damages award for tortious interference with contract and prospective business advantage. In that case the jury had awarded $269,000 in actual damages. In that context the Tenth Circuit interpreted *Gore* as follows.

First, the punitive damage award must relate to conduct occurring within the state. *Continental Trend*, 101 F.3d at 636-37. This factor does not weigh in favor of remittitur because this is a federal case.[15] *Cf. Gore*, 116 S.Ct. at 1604 (state jury increased punitive damage award based on conduct outside state, which conduct was legal where it occurred; award thus infringed on policy choices of other states).

Second, defendant must receive "fair notice . . . of the conduct that will subject [defendant] to punishment." *Continental Trend*, 101 F.3d at 638 (quoting *Gore*, 116 S.Ct. at 1598.) "[S]ection 1981 . . . has always authorized the recovery of compensatory and punitive damages." *Carter v. Sedgwick County*, 36 F.3d 952, 955 (10th Cir.1994). Thus this factor does not weigh in favor of a remittitur.

Third, defendant must receive "fair notice . . . of the severity of the penalty" that may be imposed. 116 S.Ct. at 1598. The Supreme Court set out three "guideposts" for this requirement: "(1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive award to the actual harm inflicted on plaintiff, and (3) the comparison

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awarded in federal court." *Lee v. Edwards*, 101 F.3d at 809 n. 2 (2d Cir.1996).

[15] Even if the jury considered conduct outside the state, in this federal civil rights case that would not be objectionable. *See Deters v. Equifax Credit Info. Servs., Inc.*, 981 F.Supp. 1381, 1389 (D.Kan.1997) (the federalism concerns expressed in *Gore* have no bearing on the analysis in a purely federal case).

between the punitive award and the civil or criminal penalties that could be imposed for comparable misconduct." *Continental Trend*, 101 F.3d at 638; *Gore*, 116 S.Ct. at 1598-1603. In this case, the degree of reprehensibility is assuredly higher than defendant's conduct in *Gore* (repainting a car before selling it). *See McKnight v. Circuit City Stores, Inc.*, 1997 WL 328638, at *7 (E.D.Va. March 12, 1997). The ratio of punitive damages to harm inflicted (about 20 to 1) may be high but as the Supreme Court noted, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." 101 F.3d at 639, quoting *Gore*, 116 S.Ct. at 1602. Both examples apply in this case. Also, the 20 to 1 ratio here does not in itself violate due process. *See, e.g., Deters v. Equifax Info. Servs.*, 981 F.Supp. 1381 (D.Kan. 1997) (hostile environment sexual harassment; jury awarded $5,000 in compensatory and $1,000,000 in punitives; court amended judgment for punitives to bring total damages within statutory cap and found $295,000 punitives did not violate substantive due process);

Additionally, the Tenth Circuit has noted that a substantial punitive award may be required to "influence the behavior of a prosperous corporation." *Continental Trend*, 101 F.3d at 641. The Court acknowledges the Supreme Court's note that caution must be exercised in considering the size of a defendant, but adds that to a large degree that caution is based upon a concern that state courts not unduly burden interstate commerce. *See Continental Trend*, 101 F.3d at 641, citing *Gore*, 116 S.Ct. at 1604. Such a concern is not relevant to a federal civil rights case such as this.

Finally, this case is different from cases like *Gore* and *Continental Trend*, which ordered remittiturs in cases involving "mere economic damages." *Deters*, 981 F.Supp. at 1391 (citing *Federal Deposit Insurance Corporation v. Hamilton*, 122 F.3d 854, 861-62 (10th Cir.1997); *Continental Trend*, 101 F.3d at 638; *Gore*, 116 S.Ct. at 1599.) Rather, it involves personal injury and emotional damages. The punitive damage award in this case, though large, is not unjustly so. It does not violate substantive due process. Dillard's motion for a remittitur on this basis is denied.

IT IS THEREFORE ORDERED that Dillard's *Motion for Judgment As A Matter of Law, Or Alternately For A New Trial Or Remittitur*, (Doc. # 150) filed December 19, 1997 be and hereby is OVERRULED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. KANSAS.

No. CIV.A. 97-2182-KHV.

PAULA DARLENE HAMPTON and DEMETRIA COOPER,
Plaintiffs,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

Nov. 25, 1997.

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiffs Paula Hampton and Demetria Cooper seek damages for acts committed by Dillard Department Stores, Inc. ("Dillard's"), through its security officer Tom Wilson. Specifically, plaintiffs claim that Wilson discriminated against them on the basis of race, in violation of 42 U.S.C. § 1981, by depriving them of their right to make, perform, modify and terminate a contract and to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's. Plaintiffs also claim that Wilson falsely imprisoned them in violation of Kansas law. This matter comes before the Court on *Defendant's Motion For Summary Judgment* (Doc. # 67) filed September 24, 1997. For the reasons stated more fully below, the Court finds that defendant's motion should be sustained.

Summary Judgment Standards

Rule 56(c) of the Federal Rules of Civil Procedure directs the entry of summary judgment in favor of the party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The court's inquiry is to determine "whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Entry of summary judgment is mandated, after an adequate time for discovery and upon motion, against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial. *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 893 (10th Cir.1994). Summary judgment is inappropriate, however, if there is sufficient evidence on which a trier of fact could reasonably find for the nonmoving party. *Prenalta Corp. v. Colorado Interstate Gas Co.*, 944 F.2d 677, 684 (10th Cir.1991).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact by informing the court of the basis for its motion. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir.1993). This burden, however, does not require the moving party to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552 (emphasis in original). Once the moving party properly supports its motion, the nonmoving party may not rest upon mere allegation or denials of his or her

pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir.1993). The court reviews the evidence in a light most favorable to the nonmoving party, *e.g., Thrasher v. B & B Chem., Co., Inc.*, 2 F.3d 995, 996 (10th Cir.1993), under the substantive law and the evidentiary burden applicable to the particular claim. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513.

Summary judgment is appropriate unless there is a genuine issue of material fact—meaning that a "reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514.

Factual Background

The following material facts are undisputed or, where disputed, are viewed in the light most favorable to plaintiffs:

Plaintiffs are African-American females. On April 5, 1996, they were shopping for Cooper's son in the children's department of Dillard's store in Overland Park, Kansas. Plaintiffs had four children with them—an infant, a one-year-old and two seven-year-olds. Dillard's plain-clothed security officer, Tom Wilson, noticed plaintiffs in the children's department and began watching them. Wilson particularly watched Cooper, who had a rolled-up dark cloth item in her hand. Wilson saw Cooper looking toward the ceiling and looking around, which he interpreted as checking to see if someone was watching. When plaintiffs entered a fitting room, Wilson asked Pam Fitzgerel, another Dillard's employee, to watch plaintiffs in the fitting room. Fitzgerel could see into plaintiffs' fitting room because the door was open. Fitzgerel saw Cooper push a rolled-up cloth item into her jacket and reported her observation to Wilson, stating at least twice that she was "positive" she had observed Cooper putting something underneath her coat. When they left the fitting room, plaintiffs went to an open cash register and

Hampton purchased an outfit for Cooper's son. In return for the purchase Dillard's gave plaintiffs coupons for men's cologne samples, redeemable at the men's fragrance counter. Plaintiffs then proceeded to the fragrance and cosmetics area, which is located at the nexus where Dillard's meets the mall.

Wilson interrupted plaintiffs while they were redeeming the cologne samples from fragrance consultant Betty Chouteau. Wilson informed plaintiffs that someone had observed Cooper placing something blue underneath her coat. While in the children's department Cooper had handled two pieces of blue merchandise. Hampton purchased one of them, and Cooper gave the other to one of the children to return to the store display. Cooper had also carried her son's coat.

Wilson told plaintiffs that he needed to look inside their Dillard's bag.[1] He compared the receipt to the merchandise in the bag and found that it matched. Hampton told Wilson that she did not appreciate being accused of shoplifting and that she spent a great deal of money at Dillard's and did not deserve to be treated "this way." Hampton was upset and raised her voice. Wilson told Hampton to calm down or he would call the Overland Park Police and have plaintiffs removed from the store. Wilson did not suggest that he would call the police to investigate the alleged shoplifting. Nor did he physically touch plaintiffs, arrest them, or use any racial epithets or derogatory remarks to or about them.

Wilson "shoved" the bag and merchandise at Hampton, remarking "that's fine." Plaintiffs did not attempt to redeem the fragrance coupons after the encounter because, according

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[1] Hampton understood that Wilson was a Dillard's security officer after his first comments to them. Cooper was not initially aware of Wilson's identity and, in fact, believed he could be a "pervert." Cooper finally understood Wilson's identity near the end of the encounter when he gave Hampton his name and title.

to Hampton, "it wasn't a concern to her." Instead, plaintiffs proceeded to customer service to complain about Wilson. Wilson did not follow plaintiffs to the customer service department. No more than five minutes elapsed between the time Wilson approached plaintiffs at the fragrance counter and the time he returned their property to them.

Plaintiffs argue that Dillard's had a pattern and practice of subjecting African-American shoppers to disparate security practices, and that Wilson's surveillance, stop, detention and search were part of that pattern and practice. In support of this position, plaintiffs offer deposition testimony from past and present security officers who testify that African-American shoppers are treated differently than white shoppers; that sales associates identify them as shoplifting suspects with no articulated basis other than race and presence in a particular department; and that African-American shoppers have complained to store management about racially discriminatory treatment of this kind.

Analysis

A. Race Discrimination under 42 U.S.C. § 1981

Litigation under Section 1981 most commonly involves the right to make and enforce contracts of employment; claims involving retail transactions are infrequent. *See Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996), and cases cited therein. Section 1981 addresses racial discrimination in contractual relationships. As amended by the Civil Rights Act of 1991, it provides as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance,

> modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981(a)-(c).

For summary judgment purposes, Section 1981 claims are analyzed under the burden-shifting scheme originally developed under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Thomas v. Denny's Inc.*, 111 F.3d 1506, 1509-10 (10th Cir.1997) (elements of plaintiff's case and allocation of burdens same under Title VII and Section 1981). Under the *McDonnell Douglas* framework, plaintiffs first must establish a prima facie case of discrimination. Accordingly, plaintiffs must demonstrate that (1) they are members of a racial minority; (2) defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i .e., the making and enforcing of a contract).[2] *See Morris*, 89 F.3d at

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[2] Defendant asserts that plaintiffs must meet a four part test: (1) that they are members of a protected class; (2) that they attempted to contract for certain services; (3) that they were denied the right to contract for those services; and (4) that such services remained available to others outside the protected class. *See White v. Denny's, Inc.*, 918 F.Supp. 1418, 1424 (D.Colo.1996). The Court finds that the three part test set forth above is the correct standard because evidence regarding the treatment of others outside the protected group is not present in every case of discrimination. Where similarly situated non-protected individuals are present, however, disparate treatment may give rise to an inference of discrimination. *See Rawlins-Roa v. United Way*, 977 F.Supp. 1101, 1105 n. 2 (D.Kan.1997). Moreover, the elements of a prima facie case are flexible and are not intended to be rigidly applied. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 n. 2 (10th Cir.1994).

413; *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir.1994); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367, 371 (D.Del.1996).

Plaintiffs claim that Wilson's actions (1) deprived them of their right to make, perform, modify and terminate a contract, and (2) violated their right to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's. With regard to the first claim, however, plaintiffs identify no contract with which Wilson interfered. A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest. *See Morris*, 89 F.3d at 414-15 (citing *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir.1989)). Because plaintiffs fail to make such a claim, summary judgment must be entered on plaintiffs' theory that defendant deprived them of their right to make, perform, modify and terminate a contract.

Alternatively, plaintiffs argue that freedom from racially discriminatory security practices is a benefit or privilege of a merchant's implied contractual offer to let them shop in its store. Plaintiffs cite no precedent for this theory and the cases have not recognized such grounds for recovery. Indeed, the United States District Court for the District of Delaware recently considered and rejected a similar argument. In *Lewis v. J.C. Penney*, 948 F.Supp. at 371-72, plaintiff sought to premise Section 1981 liability upon an implied contract between commercial establishments and the public, to the effect that those who enter store premises will be treated equally regardless of race. The court rejected this theory, reasoning that to allow plaintiff to proceed under such a theory "would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts." *Id.* This Court agrees. Congress did not intend such a result when it extended

Section 1981 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* 42 U.S.C. § 1981(b) legislatively overruling *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 109 S.Ct. 2363, 2372-73, 105 L.Ed.2d 132 (1989) (holding that Section 1981 does not extend to conduct after contract formation).[3] Accordingly, plaintiffs have failed to establish the third element of their prima facie case—that defendant infringed rights secured by Section 1981 when it interfered with the benefits and privileges of such a contract between Dillard's and its customers.

This holding does not fully resolve the matter, because in the *Pretrial Order* (Doc. # 105) entered November 17, 1997, plaintiffs advance the factual theory that Wilson interrupted them while they were redeeming their free cologne coupons, and that in doing so, he violated their rights to enjoy the benefits and privileges of their contract with Dillard's. Defendant does not deny that the samples were a benefit for purchases at Dillard's and admits that plaintiffs never redeemed the coupons. Defendant's motion for summary judgment does not discuss whether this interruption violated plaintiffs' right to enjoy this contractual benefit under Section 1981. This omission is understandable because under the *Scheduling Order* (Doc. # 18) entered July 9, 1997, defendant was required to file its motion for summary judgment before the pretrial order had been finalized. Indeed, defendant objected to those portions of the pretrial order which newly identified plaintiffs' inability to redeem the fragrance

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[3] To the extent plaintiffs seek relief for defendant's interference with their right to purchase personal property they could have sought relief under 42 U.S.C. § 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

coupons as a basis for recovery. The Court allowed plaintiffs to proceed on their factual theory because it appeared to be clarification, however, and not a departure from previously pleaded grounds for relief. Nonetheless, summary judgment on this issue is inappropriate.[4]

B. False Imprisonment

Plaintiffs claim that when Wilson detained them for "no longer than" five minutes, he falsely imprisoned them in violation of Kansas law. To state such a claim "all that is necessary is that the individual be restrained of [her] liberty without any sufficient legal cause therefor, and by words or acts which the one being restrained fears to disregard." *Thompson v. General Fin. Co.*, 205 Kan. 76, 468 P.2d 269, 280 (1970). A person must be held against her will, however, because "if one agrees of one's own free choice to surrender freedom of motion, as by remaining in a room or accompanying another voluntarily, to clear oneself of suspicion or to accommodate the desires of the other, rather than yielding to the constraint of a threat, then there is no imprisonment." *See Wright v. Montgomery Ward & Co., Inc.*, 814 F.Supp. 986, 989 (D.Kan.1993) *aff'd* 25 F.3d 1059 (10th Cir.1994), citing W. Page Keeton, et al., Prosser & Keaton on the Law of Torts § 11, at 49 (5th ed.1984). Wilson's statement to Hampton—that she needed to calm down or he would call the Overland Park Police—does not constitute false imprisonment. No liability attaches for future threats, such as calling the authorities or having plaintiffs arrested. Such conduct amounts to moral pressure, but not unlawful restraint. *See id.*

Alternatively, even assuming that Wilson restrained plaintiffs' liberty under this standard, the Court finds

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[4] The Court notes that although the coupons were a benefit of purchase, Cooper did not make a purchase. Accordingly, the Court doubts whether she has an actionable claim under Section 1981.

that defendant is entitled to summary judgment under the statutory merchants' defense, K.S.A. § 21-3424, which provides as follows:

> Any merchant, or a merchant's agent or employee, who has probable cause to believe that a person has actual possession of and has wrongfully taken, or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Such reasonable detention shall not constitute an arrest nor criminal restraint.

K.S.A. § 21-3424(c). This provision extends to civil actions for false imprisonment. *Alvarado v. City of Dodge City*, 238 Kan. 48, 708 P.2d 174, 185 (1985); *Codner v. Toone*, 224 Kan. 531, 581 P.2d 387, 389 (1978).

Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Alvarado*, 708 P.2d at 185. Plaintiffs argue that summary judgment on the merchants' defense statute is inappropriate because the existence of probable cause is a jury question. Plaintiffs are correct if the evidence, viewed in the light most favorable to plaintiffs, would permit the jury to reasonably find for plaintiffs on this issue. In this case, however, plaintiffs fail to identify material questions of fact which prevent summary judgment on the issue of probable cause.[5]

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[5] Indeed, plaintiffs admit that "the parties' evidence of what happened, the material facts, may not vary substantially . . . ." *See* plaintiffs' *Memorandum In Opposition To Defendant's Motion For Summary Judgment* (Doc. # 73) filed October 14, 1997, at p. 39.

While plaintiffs argue that a jury issue exists as to Wilson's credibility, they cite no evidence which seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room. In the circumstances, plaintiffs' evidence, taken together, is insufficient to establish a reasonable inference that Wilson's testimony is unworthy of belief. *See Cone*, 14 F.3d at 530 (evidence insufficient to raise doubts about defendant's motivation). Cooper had reached the nexus where the store met the mall; Wilson had observed plaintiff carrying a dark cloth-like item in her hand and looking around "as if to see if someone was watching her;" and Fitzgerel observed Cooper pushing a rolled-up cloth item into her jacket while in the fitting room. Accordingly, the Court finds that no material questions of fact preclude the entry of summary judgment on the basis of the merchants' defense statute. Defendant's motion for summary judgment on plaintiffs' false imprisonment claim is sustained.

IT IS THEREFORE ORDERED that *Defendant's Motion For Summary Judgment* (Doc. # 67) filed September 24, 1997, should be and hereby is sustained. The motion does not address plaintiffs' claim that defendant interfered with their ability to redeem the perfume samples, however, and plaintiffs may proceed on their claim of race discrimination under 42 U.S.C. § 1981 in this limited regard.

IT IS HEREBY FURTHER ORDERED that Demetria Cooper on or before December 1, 1997, show cause in writing why her claims under 42 U.S.C. § 1981 should not be dismissed for legal insufficiency. On or before December 3, 1997, defendant shall file any response.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Sep 4, 2001]

No. 98-3261
(D.C. No. 97-CV-2182-KHV)

PAULA DARLENE HAMPTON,
Plaintiff-Appellee,

DEMETRIA COOPER,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant-Appellant.

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW,
Amicus Curiae.

ORDER

Before HENRY, ANDERSON, and LUCERO, Circuit Judges.

The appellant's petition for rehearing is denied by the panel that rendered the decision. Judge Anderson would grant panel rehearing.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. A poll was requested and a majority of the active judges voted to deny rehearing en banc. Chief Judge Tacha and Judges Kelly and Brorby would grant rehearing en banc.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk